in the future." *Id.* *See also* RT 2680-89.

In 1972 one implementer of this campaign, looking back to its genesis, summarized it as follows: "For nearly twenty years, this industry has employed a single strategy to defend itself" involving in large part "*creating doubt about the health charge without actually denying it*," a message "articulated by variations on the theme that, 'the case is not proved.'" Ex. 330 at 1-2 (emphasis added). Because of their addiction to nicotine, the heavy smokers targeted by Philip Morris were extraordinarily vulnerable to such messages designed to create doubt about the heath charge. Addicted smokers rationalize continued use "despite obvious or apparent harm" by embracing anything that will allow them to "minimize the risk" and believe that "what I'm doing is not really as nonsensical as it seems." RT 2002-03, 2339-41. *See also* RT 1892-1904, 1930-33, 1943-47.

Tobacco industry strategists who carried out the fraud scheme noted in their internal communications that if a smoker is addicted, he or she lacks "free choice" to rationally weigh the risks and benefits of smoking. RT 2006-08 (quoting Ex. 388 at 2). A key element of the strategy was that "heavy smokers . . . must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." Ex. 330 at 1-2. Philip Morris's own expert conceded that if the manufacturer of an addictive product were to "purposely go out and create doubt" in the minds of consumers about whether it was dangerous, addicted consumers not currently suffering "any health consequences . . . would have little motivation to change." RT 5709-11.

Philip Morris did exactly that. For decades Philip Morris and its coconspirators, directly and through intermediaries created by them, made numerous false statements calculated to create false doubts in the minds of addicted consumers.

On January 4, 1954, Philip Morris and its coconspirators ran a full-page announcement in

newspapers in over 400 cities entitled "A Frank Statement to Cigarette Smokers." Ex. 363; RT 2236-40, 2681-83. It assured the public that "[w]e accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business," and "pledg[ed] aid and assistance to the research effort into all phases of tobacco use and health," overseen by "scientists disinterested in the cigarette industry." Ex. 363.

Referencing "a theory that cigarette smoking is in some way linked with lung cancer in l uman beings," the "Frank Statement" asserted that according to "[d]istinguished authorities . . . [t]here is no proof that cigarette smoking is one of the causes" of lung cancer, because the "statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life." Ex. 363. This was a "ludicrous statement," "extraordinarily untrue," "just a bald untruth." RT 1369-71. Further, "there was abundant information . . . in the published literature to prove that it wasn't true to any responsible observer." RT 2240-41. Yet during the rest of the 1950s such indefensible statements were endlessly repeated in a massive media blitz orchestrated by the companies' public relations firm. *E.g.*, Ex. 305, 404.

The vulnerability of addicted heavy smokers to these communications conveying a scientifically ridiculous message was confirmed by the sharp upward rise of cigarette smoking shortly after the Frank Statement and related media coverage appeared. Ex. 295 at 4; RT 2684. After the fraud scheme was launched, spearheaded by the "Frank Statement," those carrying out the fraud scheme on behalf of Philip Morris remarked favorably on the quick success of these communications in causing addicted heavy smokers to doubt and discount the scientific evidence on the danger of cigarettes. *E.g.*, Ex. 305 at 21.

The disinformation efforts of Philip Morris and its coconspirators continued with great vigor in the 1960s.

In 1961, the Tobacco Institute, the trade organization formed by Philip Morris and its coconspirators, *see* RT 4353-56, issued a press release commenting on a *Journal of the American Medical Association* article summarizing the preventative medicine steps necessitated by the smoking-lung cancer link. Ex. 340. The press release countered that "the cause or causes of lung cancer continue to be unknown," and that whether cigarettes cause lung cancer is "a subject of much disagreement in the scientific world." *Id.* This was false. RT 1378-83; *see also* RT 2258-60. Sir Richard Doll, one of the world's leading scientists on the health effects of tobacco in 1961, testified based on his direct knowledge that in 1961, "100 percent of cancer researchers that were concerned with lung cancer would have said that was false." RT 1383-85.

Philip Morris knew it was false. In one 1961 document, for example, its scientists observed that "[c]arcinogens are found in practically every class of compounds in smoke" and thus cigarettes cannot be considered "medically acceptable." Ex. 35 at 2024947183, -191, -195; *see also* Ex. 21 at 1; RT 2230-32, 2242-49. Even so, Philip Morris made and honored a "gentlemen's agreement" with other tobacco companies never to do the consumer product safety testing that would be necessary to make cigarettes medically acceptable, and never to try to compete on safety. RT 1509-15, 1546-63. When its scientists managed despite these restrictions to develop safer cigarette designs, Philip Morris did not implement them. RT 1522-26. *Compare* Ex. 67 at 2.

In 1962, the Tobacco Institute, of which Philip Morris was a member, attacked CBS for a supposedly "one-sided presentation against tobacco" in a program on teenage smokers, which it complained expressed "extreme opinions and prejudices," failing "to come to grips with the basic point — that the causes of lung cancer are still unknown . . . ." Ex. 342 at 1. This attack was "absolutely false." RT 2260-63.

In March 1965, a top tobacco executive appearing on behalf of Philip Morris and other tobacco companies testified before Congress and falsely stated that "there is a very high degree of uncertainty" about whether "smoking causes lung cancer or any other disease." Ex. 54 at 2, 4; *see also* RT 2253-58. In making this statement the executive had "to disregard the top scientists in his own company, who had been telling him in black and white the exact opposite for years and years." RT 2257; *see also* RT 2250-52.

In December 1965, on behalf of Philip Morris and the other companies, the Tobacco Institute urged the restoration of "needed perspective to the controversy over smoking and health," asserting: "Research to date has not established whether smoking is or is not causally involved in such diseases as lung cancer and heart disease, despite efforts to make it seem otherwise. The matter remains an open question . . . ." Ex. 648 at 1-2.

In 1984, on behalf of Philip Morris and other tobacco companies, the Tobacco Institute issued a public report on the supposed "Cigarette Controversy" in connection with congressional hearings, Ex. 456; *see* RT 2270-76, asserting it is not scientifically possible to state that cigarette smoking causes lung cancer . . . ." Ex. 456 at 6. This was "a complete falsehood" — "scientifically outrageous," a "misrepresentation of science." RT 2272-73. The report insisted that "[t]here *is* a cigarette controversy" and asserted the connection between cigarette smoking and lung cancer is just "a theory." Ex. 456 at 2. This was a scientifically "irresponsible" statement, and an "outrageous falsehood" — "[a]bsolutely, incontrovertibly, a falsehood." RT 2275-76.

Polling data confirm the success of the effort of Philip Morris and its coconspirators who worked assiduously for decades to create doubt in the minds of addicted smokers to supply them a rationalization against quitting smoking. RT 2267-69, 3118-30, 3139-46, 3167-71, 3186-91, 3196-97, 3203-06, 3211-13, 3234; RT 1991-92; Ex. 330 at 3.

Philip Morris's choice of fraud over honesty as a business strategy was explicit. Industries other than the tobacco industry whose activities were linked to lung cancer, such as the coal mining and nickel refining industries, recognized and credited the scientific data against them and promptly instituted measures to protect people from lung cancer. RT 1379-83. When presented with proposals that a more honest approach be taken, *e.g.*, Ex. 65 at 1, 3, 6; Ex. 85 at 2; Ex. 91 at 1, Philip Morris executives quashed them to protect profits — as they put it, to avoid "the potential of digging our own grave." Ex. 132. *See also* Ex. 136 at 1 (more honest approach rejected because it "could open the door to legal suits in which the industry would have no defense," and "we need to keep all the dedicated smokers we can"); Ex. 91 at 1.

6. Philip Morris's Heavy Marketing to Children, Including Boeken

Because smoking, with its extreme risk of addiction and eventual suffering and death, is not an activity in which most rational adults making a cost-benefit analysis of their long-term interests would choose to engage, Philip Morris has for decades made children as young as 12 the focus of its marketing efforts.

In its marketing efforts Philip Morris has targeted children age 12 and perhaps lower, as "90 percent of those who smoke have had their first cigarette before 18," RT 2568, 2812-13, and smokers rarely switch brands once they become regular smokers. RT 2640. "Today's teenager is tomorrow's potential regular customer," and "it is during the teenage years that the initial brand choice is made," a Philip Morris marketing strategy memo noted in 1981. Ex. 218 at 1000390808.

In the early 1950s Marlboro was marketed as a lady's cigarette through advertising appealing primarily to adult women. RT 2547-48. Beginning in 1955, Philip Morris repositioned the brand through an advertising campaign "aimed at young people," principally "starters

. . . under the age of 18," RT 2568, in particular "young males." RT 2584. *See also* RT 2617-18. The campaign employed the powerful technique of variation within a consistent theme. RT 2562, 2612. A series of advertisements depicted handsome, confident, virile, tough, independent men from different walks of life, culminating in a cowboy, the "Marlboro Man" — "models that a young boy would want to emulate." RT 2557; *see also* RT 2512, 2553-62, 2565-69, 2572-73, 2583-86, 2611-14, 2617, 2619-25, 2632-35, 2794, 2815-22.

During the 1950s and 1960s Philip Morris's massive Marlboro advertising campaign included heavy advertising on television shows with "a disproportionate number of children watching them, well above 30 percent of their audience." RT 2609; *see also* RT 2600-11.

Richard Boeken "started smoking Marlboros" while growing up in California at age 13, in 1957, because he felt "[t]hey were everywhere. They advertised everywhere. They represented [a] very macho, sophisticated, hip way of smoking. . . . [T]he message I had was that it was the one and only cigarette to smoke, and I liked them." CT 13538; *see also* RT 2439-40, 2641, 3331-32; CT 13537. Boeken becoming a Marlboro smoker at age 13 was a typical result of the Marlboro advertising campaign. RT 2537-44, 2569-73.

Internal documents reveal that Philip Morris carefully monitored the results of its marketing efforts in winning market share among children age 12 and even younger. RT 4395-4421. For example, a 1975 marketing plan on Marlboro's dominance of the youth market reported data on "the dynamics of the market among smokers below the age of 24." Ex. 239.01 at 1. Philip Morris set "no lower age limit" for this study, in which "[y]oung smokers were sought out . . . at popular 'hangouts'." *Id.* at 1-2. The study documented that Marlboro remained "the most frequent 'first regular brand'" among young smokers. *Id.* at 5-6. *See also* RT 2644-47.

A 1981 Philip Morris marketing plan entitled "Young Smokers" favorably noted the increased "prevalen

teenage smoking" over the prior fifteen years and how Marlboro's "success . . . during its most rapid growth period" was in part "because it became *the* brand of choice among teenagers who then stuck with it as they grew older." Ex. 218.01 at 1000390805, -808. The document noted Philip Morris's "high share of the market among the youngest smokers," and even divided the analysis of market share among young smokers into three groups (ages 12-14, 15-16, and 17-18). *Id.* at 1000390809-11, -28. *See also* RT 2636-44.

The younger a person starts smoking, the more easily addicted he or she will likely become, and 13-year-old Boeken quickly became a heavily addicted, two-pack-a-day Marlboro smoker. RT 1980-81. Smoking interfered with Boeken's athletics and he suffered from bouts of bronchitis, so Boeken made at least eight serious efforts to quit. Like half of all smokers who make multiple quit attempts, see p. 5, *supra*, Boeken was unsuccessful in quitting for more than a few weeks — even though he beat his addictions to both heroin and alcohol. RT 1977-91, 2321-26, 3327-30; CT 13558-59.

Although Boeken was aware of a controversy over whether smoking was dangerous and knew that the government had required warnings to be put on cigarette packs, he did not credit these health-related allegations and regarded them as political in nature. CT 13540-42. He knew the tobacco companies regularly contested these allegations and he believed the tobacco companies; he did not believe that the executives of such major corporations would lie. CT 13542-50, 13561. A top Philip Morris executive testified that it was not unreasonable for consumers to respect and believe its executives. RT 4492-93.

In 1967, relatively early into his addiction to nicotine, on his first quit attempt Boeken managed to stop smoking for several weeks at the insistence of a girlfriend. RT 2322-23. If in the 1960s Philip Morris had disclosed to Boeken what it knew about the dangers of its cigarettes, Boeken would have stopped smoking,

CT 13564-64A, thus avoiding any serious risk of lung cancer. RT 1414, 1456, 2446-47. Instead, Boeken continued smoking.

In 1999 Boeken was diagnosed with lung cancer and filed this lawsuit. CT 1-66. After a painful two-year battle against the disease, *see* RT 3344-50, 3353-58, he died on January 16, 2002.

7. Philip Morris's Profits From Its Fraud Scheme

In 1954, Philip Morris widely publicized its promise that "people's health" was its "basic responsibility, paramount to every other consideration in our business." Ex. 363; *see also* pp. 8-9, *supra*. Later that year a top executive for Philip Morris reinforced and elaborated on this promise by publicly stating in a major address that "[i]f we had any thought or knowledge that in any way we were selling a product harmful to consumers, we would stop business tomorrow." Ex. 2340 at 3 (Weissman); *see also* Ex. 9347 at 2 ("I need hardly say that no person in Philip Morris . . . would engage in the manufacture or sale of cigarettes if we believed there was a sound basis to the statements being currently publicized.") (Weissman, 1953).

Philip Morris did not keep its promises to the public. Instead of voluntarily stopping business Philip Morris pursued the fraud scheme. Instead of, at minimum, disclosing it knew its cigarettes were deadly and addictive (thereby likely forcing it out of business through a combination of consumer choice, litigation, and regulation), Philip Morris pursued the fraud scheme. The sums Philip Morris was able to collect on account of its fraud scheme are staggering: from 1954 through 2000 Philip Morris earned a total of at least $96.57 billion (in 2000 dollars) on account of its tobacco business, even though it paid out about half of these profits in dividends each year rather than reinvesting them to earn greater profits in the future. CT 13496-97, 13533-34.

B. Proceedings Below

1. The Jury's Verdict

After a trial spanning two months, on June 6, 2001, the jury returned a verdict in favor of Boeken on multiple fraud claims (among other claims) for $5.54 million in compensatory damages, and for $3 billion in punitive damages. RT 6440-42; CT 14839-41.

2. The Trial Court's Remittitur Order

In its posttrial motions Philip Morris moved for a new trial or, in the alternative, for a substantial remittitur of the amount of punitive damages. CT 10378-79, 10520-53. Boeken argued that there was no basis for a new trial, or even a remittitur, as to punitive damages. CT 13463-13512.

In its posttrial order regarding punitive damages, App. 149a-161a, 173a-174a, the trial court analyzed the reprehensibility of Philip Morris's fraud scheme, *id.* at 150a-154a concluding: "Philip Morris's conduct was in fact reprehensible *in every sense of the word*, both legal and moral," App. 154a (emphasis added) — "utterly reprehensible," with "devastating and widespread consequences." App. 156a.

Nonetheless, even though the jury's $3 billion punitive damages verdict was only a fraction of the illicit profits from Philip Morris's reprehensible fraud scheme, and thus was in itself only a small step toward deterring such misconduct in the future, the trial court reduced the award as "excessive as a matter of law" under California law, App. 149a, based on an analysis of the "legally appropriate punitive-to-compensatory ratio" under California law. App. 154a. Based on its analysis of the California law "ratio" test, the trial court held that "a ratio of approximately 20-to-1 is appropriate in this particular circumstance," and accordingly conditionally granted the motion for a new trial unless Boeken consented to a reduction of the punitive damages award

to $100 million. App. 160a-161a. Boeken consented to the reduction of punitive damages. CT 14837-41.

3. The Court of Appeal's Decision

After Philip Morris filed its notice of appeal, on September 10, 2001, Boeken filed a notice of cross-appeal limited to challenging the trial court's reduction of the punitive damages award.

Citing copious amounts of evidence, the court of appeal agreed with the trial court that the fraud scheme under which Philip Morris intentionally injured Boeken was in every sense of the word reprehensible. App. 4a-13a, 17a-25a, 57a-64a. Yet it ordered that the punitive damages award must be reduced still further, to $50 million, so that it bears roughly a 9-to-1 ratio to the $5.54 million compensatory damages award in this case. Despite all the evidence of Philip Morris's immensely reprehensible, immensely profitable fraud scheme perpetuated for decades, the court of appeal reasoned that nothing more than a 9-to-1 ratio was permitted under federal due process principles. App. 63a-65a, 70a-75a. *See also* App. 134a-138a, 140a-147a (similar analysis in initial decision from which both Boeken and Philip Morris sought rehearing).

The decision of the court of appeal was filed on April 1, 2005. The judgment of the trial court was affirmed as modified, conditioned on Boeken electing a reduced punitive damages award in lieu of a new trial, App. 75a, which he subsequently did On August 10, 2005, the California Supreme Court denied Boeken's timely filed petition for review; before doing so, it denied Philip Morris's motion to strike Boeken's petition (which argued Boeken had waived the right to petition). App. 1a.

REASONS FOR GRANTING THE WRIT

In carrying out their obligation faithfully to apply, to the best of their understanding, this Court's precedents in the field of punitive damages, the courts of the State of California and other lower courts have recently begun applying a *Lochner*-era view of federal substantive due process which poses extreme dangers for the ability of the States to deter intentional wrongs, and for the ability of honest businesses to maintain their standards when faced with less honest competitors which enjoy the financial benefit of undeterred fraud schemes.

Under this approach, punitive damages awards are presumptively capped at a 9-to-1 ratio to compensatory damages, even in cases involving extremely reprehensible misconduct, and even when a punitive damages award reduced to this level is inadequate to deter similar wrongdoing in the future. Under this approach, substantive due process analysis is arbitrarily limited to the three formal "guideposts" addressed by this Court most recently in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Other factors relevant to ensuring an award is non-arbitrary, such as the profitability of a defendant's profit-motivated misconduct, are given little if any consideration.

The court of appeal's decision is a prime example of this disturbing trend. The jury's $3 billion punitive damages award against Philip Morris, while large, perhaps startling, in absolute terms, was imposed to punish a defendant which for decades pursued an official corporate fraud policy against Californians while knowing vast numbers of its targets would suffer and die as a result. It reaped many billions of dollars in illicit proceeds. Even so, the court of appeal imposed a 98% reduction of the award, deciding that nine times the compensatory damages Boeken happened to receive was all that was permitted by federal due process. It did this without even a suggestion that this level of punitive damages could possibly be sufficient to meet the general

deterrence function of California's punitive damages law. App. 65a-66a, 75a. (The reduced award amounted to just a few days' worth of the illicit profit received over the decades. App. 72a.) The court reduced the award to a 9-to-1 ratio even though, it noted, the 540-to-1 ratio presented by the award returned by the jury was similar to the 526-to-1 ratio upheld by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (a case presenting much less egregious facts). App. 63a-64a (citing trial court decision).

Nothing in the States' 1868 ratification of the Fourteenth Amendment suggests any design to cap punishment at a 9-to-1 multiple of compensatory damages in cases where the victims suffer a slow and painful death, or to cap punitive damages below levels that are sufficient to deter wrongdoing by those businesses willing to inflict intentional torts on consumers for profit. No such design may be attributed to this Court. Only twice in our nation's 216-year history has this Court invoked federal substantive due process to strike down a jury's punitive damages award. Both cases involved relatively minor injuries: the 10% decreased value of a luxury automobile experienced by a physician in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the 18-month period of financial uncertainty experienced by a married couple in *State Farm*. 538 U.S. at 426.

The lower courts' mistaken view that there somehow exists a presumption, as a matter of substantive due process, that punitive damages awards should not exceed a 9-to-1 ratio even in cases of reprehensible wrongdoing where much higher ratios are necessary to achieve general deterrence will likely, if left undisturbed, have pernicious consequences. This Court should grant review of this case to put an end to the mistaken approach of the court below and other courts regarding both the supposed substantive due process presumption against ratios above 9 to 1 and the failure to consider factors other than the three formal "guideposts" previously discussed by this Court — for example, the

level of illicit profits received by a defendant which has engaged in profit-motivated wrongdoing. By overriding the mistaken approach of the lower courts, this Court will safeguard the police powers of the States and the ability of honest businesses to maintain their standards in competition with dishonest businesses which, if shielded by arbitrarily imposed ratio caps, will be left free to inflict profit-motivated intentional torts on consumers undeterred by any meaningful threat of punitive damages even if their wrongdoing is uncovered and lawsuits are successfully prosecuted against them.

I. THE LOWER COURTS ARE IN CONFLICT OVER THE IMPORTANT ISSUE OF WHETHER THERE EXISTS A SUBSTANTIVE DUE PROCESS PRESUMPTION THAT PUNITIVE DAMAGES AWARDS MAY NOT EXCEED A SINGLE-DIGIT MULTIPLE OF COMPENSATORY DAMAGES

A good illustration of the flawed approach to the ratio "guidepost" taking hold in the lower courts in the aftermath of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), is found in the California Supreme Court's recent decision in *Simon v. San Paolo U.S. Holding Company, Inc.*, 35 Cal.4th 1159 (2005). There, the court explained that based on its understanding of this Court's *State Farm* decision, the Due Process Clause of the Fourteenth Amendment establishes

> a type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than nine or 10 to one are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages) cannot survive appellate scrutiny under the due process clause.

Id. at 1182.

In *Simon*, the injured plaintiff was a wealthy real estate investor who was defrauded in conjunction with a proposed real estate transaction. He was awarded $5,000 in compensatory damages and $1.5 million in punitive damages, a 300-to-1 ratio. The court viewed the case as involving "low" reprehensibility, *id.* at 400, and given the defendant's "relatively light culpability" the court held that a $50,000 punitive damages award (10 times the compensatory award which though "quite small . . . did accurately measure the injury proven to have been inflicted") was the maximum permitted by federal substantive due process. *Id.* at 400-01.

Of concern is not the application of this purported presumption to a case of low reprehensibility such as *Simon*, in which a 10-to-1 ratio may be satisfactory to meet a State's objective to punish such wrongdoing and to deter similar future wrongs. Of concern is the application of this purported presumption to cases of high reprehensibility where much larger ratios may be necessary to deter intentional, repetitive, reprehensible misconduct — cases like this one.

In this case, the court of appeal adopted the view that *State Farm* erects a presumption that ratios above 3 to 1 or 4 to 1 are constitutionally suspect, and ratios above 9 to 1 are presumptively unconstitutional. App. 63a-65a, 71a (citing *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal.App.4th 1020, 1057 (4th Dist. 2003), and *Bardis v. Oates*, 119 Cal.App.4th 1, 26 (3d Dist. 2004), *cert. denied* (2005) 125 S. Ct. 1325). The court of appeal relied on this line of authority to hold that even in the context of a case like this — involving intentional, thoroughly reprehensible misconduct pursued over decades and resulting in both enormous physical and mental suffering and death and enormous illicit profits — this presumption of unconstitutionality had not been overcome, so "that more than a single digit multiplier is not justified." App. 75a.

The court below is not the first California court to enforce a presumption against ratios exceeding a single

digit in a case involving reprehensible wrongdoing and physical suffering and death, in which the States have a paramount interest in ensuring that effective deterrence of future similar misconduct is not arbitrarily limited. For example, *Romo v. Ford Motor Co.*, 113 Cal.App.4th 738 (5th Dist. 2003), involved three family members killed and three injured due to a wantonly defective Ford Bronco roof design which caused the roof to flatten during a routine rollover. The jury awarded $290 million in punitive damages, and the total compensatory damages were ultimately set at about $5 million, a ratio of about 58-to-1. Perhaps a ratio of 58-to-1 was excessive on the facts of that case, but the ratio-driven result in *Romo* is nonetheless jarring: despite the reprehensible misconduct and the loss of life involved, the court of appeal reduced the punitive damages award to $23.7 million, so that it would bear roughly a 5-to-1 ratio to the total compensatory damages, *id.* at 763, an amount it viewed as "somewhere near the top of the permissible range . . . ." *Id.* at 754.

A similar ratio was imposed in a California tobacco case against Philip Morris predating this one whose record, while not as extensive as the one in this case concerning the need for large punitive damages, contained ample evidence of reprehensible misconduct. The case was *Henley v. Philip Morris, Inc.*, 9 Cal.Rptr.3d 29 (Cal. App. 1 Dist.), *rev. dismissed*, 97 P.3d 814 (Cal. 2004), *cert. denied*, 125 S.Ct. 1640 (2005). In *Henley* the jury awarded $1.5 million in compensatory damages and $50 million in punitive damages, a 33-to-1 ratio. The trial court cut the punitive damages to $25 million, a 17-to-1 ratio. The court of appeal concluded that the *State Farm* decision compelled it to cut the award still further, to just $9 million, so it would bear a 6-to-1 ratio to the compensatory damages, despite the "extraordinarily reprehensible conduct of which plaintiff was a direct victim." *Id.* at 73. "In light of *Campbell*," it explained, "we do not believe that the 17-to-1 ratio reflected in the present judgment can withstand scrutiny. As we read

that case, a double-digit ratio will be justified rarely, and perhaps never in a case where the plaintiff has recovered an ample award of compensatory damages." *Id.*

The California courts are hardly alone in reading this Court's *State Farm* decision to require a single-digit, sometimes a low single-digit, ratio, even in cases involving extremely reprehensible wrongdoing. *E.g.*, *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (reducing punitive damages in individual smoker's personal injury lawsuit against tobacco company based on design defect from roughly a 4-to-1 ratio to roughly a 1-to-1 ratio, even though the court found defendant's misconduct "highly reprehensible"); *Planned Parenthood of the Columbia/ Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 952-54, 957-63 (9th Cir. 2005) (imposing a 9-to-1 ratio to cap punitive damages awarded against defendants who had engaged in a campaign of terror and intimidation, including death threats, against the plaintiff physicians); *Bains LLC v. Arco Products Co.*, 405 F.3d 764, 767-69, 776-77 (9th Cir. 2005) (holding that a 9-to-1 ratio is the maximum allowable ratio for punishment of lengthy, repeated pattern of vindictive racial taunting by a company manager).

Some lower courts have refused to read this Court's *State Farm* decision as creating any sort of presumption against punitive damages awards exceeding single-digit ratios. The leading example is the oft-cited decision authored shortly after *State Farm* by Judge Posner in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). *Mathias* involved a $186,000 punitive damages award bearing a 37-to-1 ratio to the $5,000 in compensatory damages won by hotel guests who were fraudulently rented a room with bedbugs. Judge Posner declined to find any presumption against punitive damages awards exceeding a single-digit ratio. The only presumption set out by this Court, he noted, involved a much higher ratio: this Court had "said merely that 'there is a presumption against an award that has a 145-

to-1 ratio' . . . ." *Id.* at 676 (quoting *State Farm*, 538 U.S. at 426). Based on his reading of this Court's decision, and an analysis showing a practical need to uphold the jury's full award to satisfy the deterrence function of punitive damages under Illinois law, Judge Posner left the 37-to-1 ratio undisturbed. *Id.* at 676-78.

Judge Posner is, we submit, correct in his parsing of this Court's *State Farm* decision. Indeed, in *State Farm* this Court was careful not to overstate the force of even the presumption against a 145-to-1 ratio which it did articulate. It confined its discussion of that presumption to "the context of this case," a factual context (involving an 18-month period of financial uncertainty experienced by a married couple) as to which it had "no doubt that there is a presumption against an award that has a 145-to-1 ratio." 538 U.S. at 426.

By contrast, in the portion of its opinion which various lower courts cite as imposing a presumption against ratios exceeding 9 to 1, this Court made no reference to any legal presumption (it referenced a "presumption" only as to the 145-to-1 ratio). Instead it made a statement of description about past cases and of prediction about future cases, observing: "in practice, few awards exceeding a single-digit ratio . . ., to a significant degree, will satisfy due process." 538 U.S. at 425. Countering any suggestion this language somehow established a legal presumption, just 16 lines later this Court observed that on the other hand, "ratios greater than those we have previously upheld" (in one case, a 526-to-1 ratio) "may comport with due process," depending "upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Although it appears many lower courts misread this Court's *State Farm* decision as imposing a federal substantive due process presumption against punitive damages awards exceeding a 9-to-1 ratio, in at least a few decisions lower courts have set forth an analysis consistent with Judge Posner's reading of *State Farm*. *E.g., Williams v. Philip Morris Inc.*, 48 P.3d 824, 828, 838-

43 (Or. App. 2002), *rev. denied*, 61 P.3d 938, *cert. granted, judgment vacated*, 540 U.S. 801 (2003), *reinstated on remand*, 92 P.3d 126, 130, 142-46 (Or. App. 2004) (upholding in full, on remand after *State Farm*, a $70.5 million punitive damages award against Philip Morris in a case involving a victim's death, bearing a 97-to-1 ratio to the compensatory damages), *review granted*, 104 P.3d 601 (2004); *Romanski v. Detroit Entertainment, L.L.C.*, 2005 WL 2811242, *1-*3, *13-*16 (6th Cir. Oct. 28, 2005) (upholding $600,000 in punitive damages on $279 in emotional distress and economic damages (a 2,150-to-1 ratio), awarded to an elderly woman who was rudely detained in, and ejected from, a casino after baseless claim of a violation of casino rules).

As this Court emphasized in *State Farm*, the reprehensibility of a defendant's misconduct is the single most important factor in deciding whether a punitive damages award is excessive. 538 U.S. at 419. Yet when faced with some of the most reprehensible conduct imaginable in a tort case, the court of appeal below imposed a 9-to-1 ratio — roughly the same ratio that was ultimately upheld in several other cases reviewed by this Court involving comparatively minor reprehensibility.[2] Based on its view that there exists, as a matter of substantive due process, a presumption against a

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[2] *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah), *cert. denied*, 125 S. Ct. 114 (2004) (9-to-1 ratio) ($9 million punitive damages, on $1 million compensatory damages for couple's 18-month emotional distress about possible loss of property due to defendant's insurance bad faith); *Leatherman Tool Group v. Cooper Industries, Inc.*, 285 F.3d 1146, 1150, 1152 (9th Cir. 2002) (10-to-1 ratio) ($500,000 punitive damages, on $50,000 compensatory damages for defendant's non-fraudulent use of photos of competitor's product to gain minor competitive advantage); *BMW of North America, Inc. v. Gore*, 701 So.2d 507, 515 (Ala. 1997) (12.5-to-1 ratio) ($50,000 punitive damages, on $4,000 compensatory damages for failure to disclose repainting of portions of new automobile where defendant's policy was lawful in many states, there was no evidence of bad faith, and the policy was immediately terminated nationwide when held wrongful in one state).

punitive damages exceeding more than a 9-to-1 ratio, the court of appeal declined to sustain 98% of the jury's original award even though the 540-to-1 ratio presented was roughly the same ratio upheld by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (526-to-1), involv-ing much less reprehensible facts. App. 63a-64a.

In a ruling reconcilable with neither *TXO* nor *State Farm*, and which vividly illustrates how markedly the lower courts have gone astray in their analysis of the ratio guidepost, the court of appeal imposed a 9-to-1 ratio cap without explaining how a punitive damages award totaling a few days of Philip Morris's illicit profits would adequately serve California's interest in deterring future conduct similar to its extremely reprehensible and extremely profitable course of conduct. Consistent with its view expressed in *Simon* that there is a presumption against punitive damages awards exceeding a 9-to-1 ratio, see pp. 20-21, *supra*, the California Supreme Court denied review. Review by this Court is obviously needed to correct a serious misreading of this Court's precedents, and of the Due Process Clause, by the California courts and other lower courts.

For this Court to leave the court of appeal's judgment undisturbed would risk pernicious effects. The court held that a 9-to-1 ratio is the constitutional maximum even in a tort case involving some of the most reprehensible facts imaginable. If that approach stands, it will undermine the deterrent effect of punitive damages throughout California, and in other jurisdictions, for years to come. If the most egregious wrongdoers can feel assured that even if their wrongs are detected and civil litigation filed, and years later punitive damages are awarded, punishment will be capped at nine times compensatory damages, just as Philip Morris did for decades they will feel emboldened to commit intentional wrongs against vulnerable victims if they calculate the anticipated illicit profits as exceeding the anticipated penalties. The victims of this cost-benefit analysis will be

honest, law-abiding citizens, as well as honest, law-abiding businesses which will, at minimum, feel pressure to lower their business standards to match the methods and results of their dishonest competitors. Review is necessary to dislodge the perverse incentive system created by this mistaken reading of federal due process.

II. A GRANT OF REVIEW IS WARRANTED TO CLARIFY THAT THE ILLICIT PROFIT, OR LACK THEREOF, RECEIVED BY A DEFENDANT THROUGH THE MISCONDUCT WHICH INJURED PLAINTIFF IS AN IMPORTANT FACTOR IN THE REVIEW OF PUNITIVE DAMAGES AWARDS

There is also a need for review by this Court to clarify the degree to which the illicit profit, or lack thereof, received by a defendant through misconduct which injured the plaintiff is an important factor in the review of punitive damages awards — either as a formal, fourth "guidepost," or otherwise. Even though the illicit profits received by Philip Morris through the policy of fraud it directed at Boeken over decades was a major feature of Boeken's defense of the jury's punitive damages award, the court of appeal did not analyze the illicit profits issue. App. 63a-75a. We submit this was legal error. Review of this case is appropriate to clarify for the lower courts that they must consider the illicit profits issue, if relevant, to help ensure that punitive damages are meted out in an non-arbitrary manner.

In *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, setting out the three "guideposts" all reviewing courts must analyze in deciding a federal substantive due process challenge to a punitive damages award, and before and after *BMW*, the justices of this Court have repeatedly indicated that the profitability of the defendant's misconduct is a factor which logically can be considered as bearing on whether a particular

punitive damages award is constitutionally excessive.[3] As this Court has recognized, the approach of considering a wrongdoer's illicit profits in setting punishment has strong support in the field of law and economics, which can provide a useful framework for evaluating claims that a given punitive damages award is excessive. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 438-40 (2001); *see also BMW v. Gore*, 517 U.S. at 592-93 (Breyer, J., joined by O'Connor and Souter, JJ., concurring).

The rationale for relying on evidence of the level of illicit profits received by the defendant from the wrongdoing directed at the plaintiff is especially strong in a case like this one, involving a profit-motivated policy of intentional fraud. As to wrongdoing pursued solely for profit, by definition such wrongdoing can only be

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[3] In upholding the punitive damages award in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S.1 (1991), this Court approved the consideration under Alabama law of "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss . . . ." *Id.*at 22.

In *BMW v. Gore*, three justices (whose votes were essential to the result of the case) explicitly endorsed this "profitability factor" of Alabama punitive damages law as having "the ability to limit awards to a fixed, rational amount" — for example, in that case, through a focus on "the $56,000 in profits evidenced in the record" which the defendant had received from its fraudulent sale of a repainted car to the plaintiff, and from its 13 other fraudulent sales to other persons in Alabama. 517 U.S. at 591 (Breyer, J., joined by O'Connor and Souter, JJ., concurring).

In *TXO*, this Court focused on the "substantial" royalties the defendant had sought to obtain by acting "in bad faith," 509 U.S. at 450-51 & n.10 (plurality opinion), estimating that the $10 million punitive damages award was less than ten times the royalties the defendant had illicitly sought to obtain. *Id.* at 461-62.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court again commented positively on analyzing whether a punitive damages award is constitutionally excessive based in part by reference to the "anticipated gross profits . . . attributable to [defendant's] misconduct," provided that such profits are not estimated using "unrealistic" assumptions. *Id.* at 442 (internal quotations omitted).

deterred by punitive damages if the threat of sizable punitive damages, to be imposed in those cases where the defendant is caught and punished, is when viewed *ex ante* large enough that potential wrongdoers will conclude that anticipated wrongs will not in the end yield a net profit. Without setting punitive damages high enough, over the likely number of cases, to pose a real economic deterrent even if a wrongdoer *ex ante* has little fear of being caught or being successfully prosecuted if caught, there can be no real hope of deterring future wrongdoing by those seeking out illicit profits. On the other hand, once punitive damages have been set high enough to remove any prospect of gain from such wrongdoing, there is no further need, from a deterrence perspective, for larger punitive damages.

Hence, a focus on the illicit profits factor, which this Court may wish to consider elevating to a "guidepost," helps redress the concern this Court repeatedly expressed in *State Farm* about "arbitrary punishments" that result from "the imprecise manner in which punitive damages systems are administered." 538 U.S. at 416-17. (The word "arbitrary" appears nine times in the decision.) Supporting the conclusion that lower courts must consider evidence of illicit profits if tendered (either by the plaintiff seeking to elevate the punitive award, or by the defendant seeking to limit it), this Court in *State Farm* suggested that a punitive damages award might permissibly effect "disgorgement of profits" reaped from a "fraudulent scheme," upon satisfactory proof of repeated similar misconduct by defendant. *Id.* at 428.

Despite the emphasis Boeken placed on the illicit profit factor, the court of appeal gave it little if any consideration.[4] This further illustrates the due process

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[4] Some California appellate decisions, however, suggest a willingness to consider the profit factor. *E.g.*, *Cummings Medical Corp. v. Occupational Medical Corp. of America, Inc.* 10 Cal.App.4th 1291, 1299-1300 (2d Dist. 1992) (rev. den. Jan. 28, 1993) (opining that "[t]he defendant's profits from misconduct are objectively based and uniquely appropriate as the basis for punitive damages," that using

straightjacket in which the lower courts perceive *State Farm* has placed them, under which a presumption exists that punitive damages ratios should not exceed single-digit ratios, and a court's function is the relatively mechanical one of deciding whether the facts involved are reprehensible enough to justify a high single-digit ratio. An unwillingness to focus on evidence of illicit profits, together with the use of a presumption against ratios exceeding single digits, will systematically yield punitive damages awards that are more, not less, arbitrary in terms of their connection to the key deterrence function of punitive damages, and will gravely undermine the ability of the States to deter intentional misconduct toward their citizens through the traditional tort remedy of punitive damages. A grant of review to clarify the proper role of evidence of illicit profits in the review of punitive damages awards is therefore justified as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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punitive damages to remove a defendant's profit "sends a clear signal to defendants that such misconduct does not pay," and that "[a] punitive damages award specifically tailored to this objective can never be 'excessive.'"); *Vallbona v. Springer* (4th Dist. 1996) 43 Cal.App.4th 1525, 1539-41 & n.19 (4th Dist. 1996) (upholding $200,000 in punitive damages based on evidence that defendants had "fraudulently obtained about $300,000 from" the roughly 120 people subjected to the bogus cellulite-removal laser treatment program under which the three plaintiffs were defrauded); *Johnson v. Ford Motor Co.*, 35 Cal.4th 1191, 1212 (2005) (addressing, but ultimately not deciding, the extent to which evidence of defendant's illicit profits should play a role in due process review of the size of a punitive damages award). It appears that in the absence of a mandate that the factor be considered where relevant, no coherent body of precedent on the issue will evolve in the lower courts.

Respectfully submitted.

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November 8, 2005

APPENDIX CONTENTS

APPENDIX A

Court of Appeal, Second Appellate District,
Division Four — No. B152959

S133884

IN THE SUPREME COURT OF CALIFORNIA

JUDY BOEKEN,	)	
Plaintiff and Respondent,	)	SUPREME COURT
	)	**FILED**
v.	)	AUG 10 2005
	)	Frederick K. Ohlrich
PHILIP MORRIS	)	Clerk
INCORPORATED,	)	DEPUTY
	)	
Defendant and Appellant.	)	

Motion to strike petition for review denied.

Request for judicial notice denied.

Petitions for review DENIED.

Werdegar, J., was absent and did not participate.

GEORGE
Chief Justice

APPENDIX B

Filed 4/1/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

JUDY BOEKEN, as Trustee, etc.,	)	
Plaintiff and Respondent,	)	
v.	)	B152959
PHILIP MORRIS INCORPORATED,	)	(Los Angeles County Super. Ct. No. BC226593)
Defendant and Appellant.	)	

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Jr., Judge. Affirmed as Modified conditioned upon acceptance of Remittitur.

Arnold & Porter, Murray G. Garnick, Robert A. McCarter, Ronald C. Redcay and Maurice A. Leiter for Defendant and Appellant.

Michael J. Piuze for Plaintiff and Respondent. **[2]**

BACKGROUND

Richard Boeken filed this action on March 16, 2000, alleging various theories including negligence, strict product liability and fraud resulting in personal injuries

caused by his cigarette addiction.[1] The complaint alleges that Boeken began smoking in 1957, when he was a minor, that he smoked Marlboro and Marlboro Lights, both manufactured by Philip Morris USA, Inc., and that he was ultimately diagnosed with lung cancer in 1999.

The cause was tried to a jury over approximately nine weeks, beginning in March 2001. The jury found that Philip Morris products consumed by Boeken were defective either in design or by failure to warn prior to 1969, resulting in injuries to Boeken. The jury also found liability to Boeken based upon fraud by intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation, concluding that Boeken had justifiably relied upon fraudulent utterances and concealment by Philip Morris. Compensatory damages in the amount of $5,539,127 were awarded by the jury. It also assessed punitive damages in the sum of $3 billion dollars.

A Philip Morris motion for judgment notwithstanding the verdict was denied. Its motion for new trial was conditionally granted solely on the issue of punitive damages unless Boeken accepted a reduction in punitive damages to the sum of $100 million, in which case the motion was denied. Boeken consented to the reduction and an amended judgment was entered on September 5, 2001. Philip Morris and Boeken each filed timely notices of appeal. **[3]**

We issued our first opinion on September 21, 2004, affirming the judgment but further reducing punitive damages to the amount of $50 million. Philip Morris and Boeken each filed petitions for rehearing, which we granted. We heard further argument on February 15, 2005. After reconsidering the issues raised by the

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[1] Since Philip Morris and Boeken have both appealed, we shall refer to them by name. Richard Boeken has died, but we shall continue to refer to respondent and cross-appellant as Boeken, since his successor in interest is his widow of the same name, Judy Boeken, trustee for the Richard and Judy Boeken Revocable Trust.

parties, we again affirm the judgment and order reduction of punitive damages to $50 million, if Boeken accepts the remittitur. If he does not, we affirm the order of the trial court granting a new trial to Philip Morris on the issue of punitive damages.

EVIDENCE REGARDING SMOKING, ITS EFFECTS AND THE FALSE CONTROVERSY[2]

Physicians had the ability in the mid-nineteenth century to diagnose lung cancer. It was a rare disease until some years after the first commercial pre-rolled cigarettes were introduced in the United States in 1913. In the 1930s, there was a sharp increase in the number of cases diagnosed, and by the end of World War II, its incidence had increased 20-fold. Boeken's epidemiological expert, Dr. Richard Doll, joined Professor Bradford Hill at the London School of Hygiene in the late 1940s, to conduct the first studies in the United Kingdom to determine the cause of lung cancer, and why its incidence had increased so dramatically. Statistics established a causal [4] connection between smoking and cancer, and Doll and Hill published their results in 1950 in the British Medical Journal. [3]

A Dutch scientist had published a paper in 1948, having reached the same results, and in 1950, a smaller American study was published in the *Journal of the American Medical Association* by American scientists, Drs. Graham and Wynder, also reaching the same conclusion. There had been earlier studies in Germany, but they were not given much weight because the scientific methods used were not optimal.

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[2] Because Philip Morris challenges the sufficiency of the evidence on various issues, we set out the facts in the light most favorable to the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

[3] Doll has been awarded many honors over the years for his work on tobacco, including knighthood in 1971.

The popular media and the UK Department of Health were not convinced by the Hill and Doll study, and so the two undertook a years-long study of 40,000 smoking and non-smoking English doctors who did not have lung cancer. They thought it would take 5 years to complete the study. But in 1954, after two years and 35 deaths due to lung cancer, they felt the results were clear and published their findings immediately in the British Medical Journal. This study was more widely accepted than the previous studies and changed attitudes considerably.

The American Cancer Society then undertook a two-year study with 190,000 subjects, in order disprove Doll's conclusions. In 1954, its scientists reported their belief that the conclusions reached in British study had been correct. Even after publication of Doll's second study and the American Cancer Society study, some leading scientists still questioned the link between lung cancer and smoking, and opinion among scientists was evenly divided until about 1956. At that time, opinion had firmed up quite definitely among scientists that smoking caused lung cancer. **[5]**

Neil Benowitz, M.D., Boeken's addiction expert, testified that nicotine is addictive, and the most effective way addiction is achieved is delivery by cigarette smoke.[4] Withdrawal symptoms include irritability, anxiety, insomnia, trouble concentrating, nervousness, and

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[4] More specifically, Benowitz testified that nicotine is similar to a hormone called acetylcholine (ACH), which is responsible for nerve communication, and is highly concentrated in the brain. ACH binds to receptors which release other hormones that affect mood and behavior. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Nicotine becomes necessary for the brain to function normally. Smoking creates an aerosol, and when the gas goes directly to the lungs, it delivers the nicotine instantly to the heart and brain, achieving its effect within 15 seconds. This immediate reinforcement encourages addiction. Thus, the smoking (of any addictive substance) is the delivery system that causes the fastest addiction.

dysphoria (mild depression), and can last for months after quitting. Some symptoms last forever. Smokers use denial and rationalization to continue doing what is obviously or apparently harming them and may acknowledge a general risk, but given a choice of conflicting opinions, they will choose the opinion that supports continued tobacco use.

In 1954, the tobacco industry embarked upon a decades-long strategy to create public doubt about the "health charge" through "vigorous" but not actual denial, such as by claiming that experimental proof was still lacking, and that the statistics were not to be trusted, because they were poorly obtained or grossly exaggerated.[5]

First, several tobacco companies, including Philip Morris, formed the Tobacco Industry Research Committee (T.I.R.C.), a public relations organization, **[6]** to counter the "anti-cigarette crusade" by providing "balancing information" regarding "unproven facts."[6] To announce its formation, it published "A Frank Statement" in newspapers across the country. The "Frank Statement" claimed: "Distinguished authorities point out . . . that there is no proof that cigarette smoking is one of the causes [of lung cancer] [and] statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics them-

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[5] Philip Morris's knowledge and actions were shown by the testimony of several former employees of the research and development department, which operated several laboratories, and by a series of internal memoranda between company officers assigned to the labs in the 1950s through the 1980s, including Helmut Wakeham, William L. Dunn, T.S. Osdene, and Robert B. Seligman.

[6] At some time in the late 1950s or early 1960s, the Council for Tobacco Research (CTR) replaced the T.I.R.C.

selves is questioned by numerous scientists."[7]

According to Dr. Doll, the Frank Statement was a "bald untruth." While some scientists had questioned the link, most knew at the time of the Frank Statement that smoking caused lung cancer.

Tobacco studies continued throughout the 1950s in many countries, including Japan, Denmark, and France. In 1957, the United States Heart and Lung Institute, the National Cancer Institute, National Institute of Health, and American Cancer Society appointed a joint committee to advise on the state of the science, and concluded that smoking was a cause of lung cancer. The Auerbach study, published in 1957, showed pictures of various stages to demonstrate how the risk of lung cancer increased after a certain number of years of smoking.

In 1960, the World Health Organization issued a report stating that smoking was a cause of lung cancer, and an editorial in the New England Journal of [7] Medicine stated that no responsible observer could deny the association. Scientists did not yet know what specific substance in cigarette smoke caused lung cancer, but it was proven by 1953 that cigarette smoking caused it by some means, and by 1960, it was indisputable.

Nevertheless, Philip Morris and other tobacco companies continued their campaign of doubt. T.I.R.C. continued its work, issuing press releases, making personal contacts with journalists, providing "favorable" materials for editorials, articles, and columns, and providing assistance to the authors of such books as *You Don't Have to Give up Smoking* and *Smoke Without Fear.*

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[7] The Frank Statement also assured the public that the industry was concerned about the possible health effects of tobacco and was researching the question, and promised that it would inform the public immediately if it found smoking tobacco to be harmful. The promise was false. Philip Morris's own expert, Dr. Carchmann, testified that the tobacco industry did not publicly admit that smoking was harmful until approximately 2000.

A 1957 T.I.R.C. press release quoted its chairman and scientific director as saying, "No substance has been found in tobacco smoke known to cause cancer in human beings." The statement was literally true in that the specific mechanism in cigarettes that caused lung cancer was still unknown, but it was misleading, because the cause and effect had been proven.

In the late 1950s, Philip Morris and other tobacco companies formed another trade organization, the Tobacco Institute, to speak on their behalf. The Tobacco Institute issued press releases, such as the 1961 "Tobacco Institute Statement," which asserted, among other things, "The repetition by Dr. Wynder of his firm opinions does not alter the fact that the cause or causes of lung cancer continue to be unknown and are the subject of continuing extensive scientific research by many agencies." And a 1962 press release sent to CBS protesting a program on youth smoking stated, "causes of lung cancer are still unknown."

The statements were false. In 1961, there were a few other established causes of lung cancer, such as asbestos, but the affected industries were taking precautions to protect people from exposure. Ninety percent of lung cancers were shown to be caused by tobacco. There was no cancer researcher at that time who would say that the causes of lung cancer continued to be unknown.

In 1965, the Tobacco Institute issued a press release based upon the "Genetic Theory" of well-known statistician Ronald Fisher, who opined that there was a genetic factor that caused people to want to smoke and that made them susceptible to lung cancer. That theory had been repudiated in studies in the 1950s in Sweden, the United States, and Finland. The press release also referred to the "smoking theory" of lung cancer, even though no serious scientific researcher considered it a legitimate scientific concept in 1965. The United States Surgeon General had already reported the link in 1964.

In the 1950s, the major cigarette companies, including Philip Morris, entered into a "gentlemen's

agreement" not to present products they marketed as "tested for safety," or to use test results to compete, such as by claiming that one company's cigarette has produced less cancer in rats, and not to do animal testing with regard to cancer. The agreement was in place throughout the 1960s.[8]

In the 1960s, Congress conducted hearings prior to enacting the Public Health Cigarette Smoking Act of 1969. (E.g., 15 U.S.C. §§ 1331, et seq.)[9] In March 1965, the Tobacco Institute issued a press release in which it described, among other things, the testimony of R.J. Reynolds president Bowman Gray before **[9]** Congress on behalf of cigarette manufacturers, including Philip Morris, in opposition to the proposed legislation. Gray told Congress that many scientists held the opinion that it had not been established that smoking caused lung cancer or any other disease; that there was a very high degree of uncertainty; and that a great deal more research was necessary before definitive answers could be given.

By the 1950s, tar was and still is thought to contain most of the organic materials that are likely to cause cancer. When cigarettes were unfiltered and contained large particulate matter, they were irritating, which kept smokers from inhaling deeply. The growing use of filtered

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[8] In prior testimony read to the jury, Dr. Jan Uydess established that Philip Morris set up a laboratory in Germany to conduct health-related studies, such as on emphysema and toxicity, and effects on animal systems. Philip Morris did not do the research in the United States, because issues relating smoking to health and addictiveness were considered to be very sensitive. The reports from the German lab were sent to senior Philip Morris scientist T.S. Osdene at his home, and he would destroy them after reading them.

[9] We shall hereinafter refer to this statute either as the Public Health Cigarette Smoking Act of 1969 or simply as the 1969 Act. The 1969 Act required a health warning on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 515-518, 525 (*Cipollone*), discussed within.)

cigarettes in the 1960s reduced the amount of delivered tar from about 35 to 25 milligrams, and was thought to reduce the risk somewhat, but filters and flavorings, which act as bronchodilators, made cigarettes easier to smoke. The benefits came in the 1950s and 1960s, which saw a reduction from the 35 milligrams in the 1930s, to 25 milligrams. But there has been no benefit from a further lowering of tar beginning in the 1980s to 10 or 15 milligrams. And further reduction of tar in the so-called low-tar or "light" cigarettes has not resulted in a safer cigarette. It has affected only the *location* of lung cancers and the type of cancer that may be contracted.

It has been generally known since the late 1800s that it is difficult to quit smoking. Scientists have known that nicotine is addictive since the 1920s, although the how and the why came later. At the time of the first Surgeon General's report in 1964, however, many thought that in order to be truly addictive, a substance had to be intoxicating, to have a severe withdrawal syndrome, and to be associated with antisocial behavior, such as criminality. The 1964 Surgeon General's report defined drug addiction as "a state of periodic or chronic intoxication produced by the repeated consumption of a drug." Since tobacco was extremely difficult to quit, but was not intoxicating and did not involve anti-social behavior, the Surgeon General used the term "habituation." **[10]**

In 1965, the World Health Organization discarded the term "habituation" in favor of "dependence," which encompassed addiction, and "addiction" and "dependence" were generally used interchangeably after that to mean any compulsive drug use. *Dependence* was defined as giving the use of a substance a higher priority than other things important to the user, like money or health. The intoxication element became obsolete, and *habituation* fell into disuse. By 1988, the Surgeon General's report dropped *addiction*, whether to intoxicating drugs or nicotine, in favor of *dependence*. But the tobacco companies continued urging obsolete terminology through misleading statements to the public, according

to Benowitz.

Internal memoranda demonstrate that as early as 1959, Philip Morris recognized that "[o]ne of the main reasons people smoke is to experience the physiological effects of nicotine on the human system"; and that Philip Morris researchers knew no later than 1959 that addiction was a probable reason why people smoked. A 1969 memorandum shows that Philip Morris's scientists recognized that nicotine was a drug, but feared regulation by the Food and Drug Administration should this knowledge become public.[10]

Dr. William Farone, who testified for Boeken, was hired in the mid-1970s by Philip Morris for his expertise in colloid chemistry, which relates to aerosols, such as smoke. It was commonly understood among the Philip Morris scientists at the time he arrived at its laboratory in 1976, that nicotine was addictive. On **[11]** several occasions, Dr. Osdene described his mission as one to "maintain the controversy," which Farone understood to mean creating doubt whether nicotine was addictive and whether smoking caused disease.

An internal memorandum shows that by 1972, Philip Morris recognized that the more nicotine a cigarette delivered, the greater its market. By then, the Marlboro brand was outselling the popular brands of earlier years.[11] A competitor, R.J. Reynolds, conducted a study to determine why, and found that the pH of Marlboro smoke was much higher than that of the smoke from any

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[10] Philip Morris attorneys were concerned that research amounting to tacit acknowledgement that nicotine was a drug would be "untimely" because of a legislative effort to transfer authority over tobacco to the FDA. In a 1980 internal memorandum, Robert B. Seligman, Osdene's successor as vice president of research and technology, suggested that Philip Morris continue to study the "drug nicotine" to stay abreast of developments with an active research program, but cautioned, "we must not be visible about it," since the attorneys would "likely continue to insist upon a clandestine effort."

[11] Marlboro is still the best selling brand in this country.

of its brands. The higher the pH in cigarette smoke, the more free-base nicotine is delivered to the smoker. Ammonia raises the pH level, and occurs naturally in tobacco. But Philip Morris added urea to Marlboro tobacco to increase the release of ammonia into the smoke.

In 1977, when Philip Morris scientist Carolyn Levy began to study the effects of nicotine withdrawal, her supervisor, W.L. Dunn, suggested to Osdene that he should "bury" any results, should they show similarities to morphine and caffeine. According to Farone, in 1984 Philip Morris shut down some of its research programs in order to eliminate research that could show that cigarettes were addictive or that could prove that they cause cancer. Senior management no longer wanted to do research that could be used against Philip Morris.

Paul Mele, Boeken's expert in behavior pharmacology, with additional training in the area of drug abuse, testified that he was employed by Philip Morris from 1981-1984. Philip Morris employed him to work in its secret laboratory where rat studies were conducted in an attempt to identify a nicotine substitute that would eliminate the adverse cardiovascular effects, but still keep people smoking.**[12]**

A nicotine substitute would have to bind in the same area of the brain and produce the same effects on brain tissue, but Mele and his coworkers were told never to use the words, "drug" or "addiction." [12] Thus, they euphemistically concluded that rats "will work for" nicotine in the same way that they will work for cocaine or heroin. But the question of addiction or dependence was never in doubt, and their research goal was not to prove or disprove addiction, but to find compounds that would substitute for nicotine, in case nicotine were ever banned.

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[12] The term cancer was not to be used either; they referred to it as "biological activity."

Dr. Mele wanted to publish a paper on nicotine tolerance during the time he worked for Philip Morris but his superiors would not permit it. He was told the research demonstrated that nicotine was a "dependence producing substance" within the definition of the Diagnostic and Statistical manual of the American Psychiatric Association, and that it would not be acceptable to the company to have this known by the public. During this period, he heard a Philip Morris officer, Jim Remmington, say, "We all know it is addicting, it's addicting as hell. And our real concern is stopping these anti-smoking people outside the gates."

With this evidence in mind, we now turn to a discussion of the issues raised on appeal. We will include further evidence from the record relevant to the specific issues addressed.

DISCUSSION

1. *Boeken's Reliance*

Philip Morris contends there is insufficient evidence to support a finding of reliance by Boeken on any false statements or nondisclosures to support the jury's verdict on fraud. In particular, Philip Morris contends that the evidence was **[13]** insufficient to prove that Boeken was aware of *specific* misrepresentations and that he acted upon those specific misrepresentations, citing *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082 (*Mirkin*);[13] that the evidence was insufficient to establish a duty to disclose the concealed information; and that

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[13] In *Mirkin*, the Supreme Court reaffirmed the California rule that a fraud cause of action requires proof of actual reliance, and rejected a fraud-on-the-market theory of reliance advocated by plaintiffs who could not plead or prove that they heard or read any of the alleged misrepresentations, whether directly or indirectly. (*Mirkin, supra*, 5 Cal.4th at pp. 1088-1092.)

any reliance by Boeken was unreasonable and therefore unjustifiable as a matter of law. But before we address these three specific arguments, we need to address the factual presentation by Philip Morris in its briefing to this court.

The jury found against Philip Morris on the fraud claims of intentional misrepresentation, concealment, false promise, and negligent misrepresentation. Philip Morris challenges only the evidence of its duty to disclose and of Boeken's reliance, not the evidence establishing that it made misrepresentations, made misleading statements and concealed the facts that would have clarified them, or that it made a false promise, all with an intent to defraud. Indeed, claiming such evidence is irrelevant to the argument regarding Boeken's reliance, Philip Morris does not summarize most of the large volume of evidence showing that it was aware of the health hazards and addictive nature of its tobacco products, or that it undertook a campaign to disseminate falsehoods about smoking and health, and to conceal the truth from the public, including Marlboro smokers such as Boeken, in order to mislead them into believing that their cigarettes were safe and not addictive.

"When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* **[14]** with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The judgment is presumed to be correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) And we presume that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) It is the appellant's burden to demonstrate that it does not. (*Ibid.*)

In furtherance of its burden, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v.*

Fallon, supra, 3 Cal.3d at p. 881.) Further, the burden to provide a fair summary of the evidence "grows with the complexity of the record. [Citation.]" (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App. 4th 278, 290.)

The record in this case is very complex. The testimony heard by the jury spans 25 of the 40 volumes of reporter's transcripts. There are also 75 volumes of clerk's transcripts in the record. Boeken has provided copies of approximately 40 exhibits admitted at trial, but it appears that there were hundreds more shown to the jury that have not been transmitted to this court. In addition, portions of Boeken's videotaped deposition were played for the jury, and the parties have lodged a redacted transcript of the deposition, containing what appears to be 300 pages. Videotaped interviews of two other witnesses were lodged at our request, and were not transcribed.

Nevertheless, Philip Morris provided only the briefest summary of the trial evidence, and summarized only those facts which support its theories. Almost all of Philip Morris's factual summary consists of evidence favorable to its position — evidence showing that the dangers of smoking were well known by the public in the 1950s and 1960s; and other evidence from which a jury could reasonably infer that Boeken understood the health risks of smoking. **[15]**

Even if Philip Morris were to show that the inferences it wishes us to draw are reasonable, we would have no power to reject the contrary inferences drawn by the jury, if they are reasonable as well. (*Crawford v. Southern Pacific Co., supra*, 3 Cal.2d at p. 429.) And a recitation solely of Philip Morris's own evidence is not a fair summary for purposes of determining whether any inferences drawn by the jury are reasonable and supported by substantial evidence. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

The issue of reliance is inextricably intertwined with the nature of the misrepresentations or concealments attributed to Philip Morris. To expect us to address the

issue of reliance without reference to all of the evidence presented at trial regarding the misrepresentations and concealments is, at best, naïve. At worst, it is an attempt to deceive.

In lieu of tendering all of the evidence, Philip Morris suggests that Boeken's counsel, Mr. Piuze, conceded the absence of evidence of reliance and causation during argument on post-trial motions when he answered, "No," to the following question by the court: "The question is, can the plaintiff point to a single statement made by Philip Morris that ultimately reached Mr. Boeken that can be traced backward through a definite causal link back to Philip Morris?" But the discussion of the matter did not end with that negative response. Piuze went on to explain to the court that the issue of reliance had been proven by *circumstantial* evidence, which demonstrates the importance of a thorough presentation of all of the evidence.

"The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814.) Reliance "'may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and **[16]** more satisfactory evidence of [reliance] than . . . direct testimony to the same effect.' [Citations.]" (*Id.* at p. 814.)

We conclude that there was no concession by Mr. Piuze. While we could deem the failure of Philip Morris to set out the facts in the light most favorable to the judgment a forfeiture of the issue (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881), we have elected not to do so and we have thoroughly reviewed the record. Our independent review has revealed sufficient evidence to support the judgment, as we discuss in the next sections.

A. *Substantial Evidence Supports Duty and Actual Reliance*

Philip Morris contends that the evidence was insufficient to establish a duty to disclose information that it fraudulently concealed. At the same time, however, Philip Morris concedes that a duty to speak may arise when necessary to clarify misleading "half-truths." (See *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1082-1083.) But, Philip Morris contends, no duty arises where the plaintiff has not been misled by the half-truths.

Philip Morris confuses the elements of duty and reliance. The duty arises upon the utterances of the half-truths; whether the plaintiff was misled is a question of reliance. (Cf., *Randi W. v. Muroc Joint Unified School Dist., supra*, at p. 1084.) Since Philip Morris does not challenge the evidence of its half-truths, we turn to its contentions with regard to reliance.

Relying on *Mirkin, supra*, 5 Cal.4th 1082, Philip Morris suggests that in order to show reliance, Boeken was required to prove that the false or misleading representations were made directly to him and that such proof must include the exact words of the false or misleading representation upon which he relied. We find no such requirements in *Mirkin*. **[17]**

As stated in *Mirkin*, Restatement Second of Torts section 533 provides: "'The maker of a fraudulent misrepresentation is subject to liability . . . to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved.'" (*Mirkin, supra*, 5 Cal.4th at p. 1095.)

We first review the evidence particular to Boeken in connection with an argument that Boeken's fraud claim

cannot stand because he could not recall a particular advertisement that made him decide to smoke.

Even before Boeken became a target member of the group of addicted smokers, Philip Morris targeted Boeken as a member of another group — adolescent boys. Until 1955, Marlboro was marketed primarily to women smokers. At that time, Philip Morris began to reposition the brand as masculine. From the mid-to-late 1950s, its ads featured a handsome, virile, tough and independent-looking young man with a tattoo, looking as though he could be a dashing movie star, a detective, a sailor, or a cowboy — the "Marlboro Man."

Marvin Goldberg, Ph.D., Boeken's marketing, advertising, and consumer behavior expert, explained how such advertising exerts a particularly powerful influence upon adolescent boys. He concluded from a review of Philip Morris's advertisements that they were intended to target young males from 10 to 18 years old, beginning in 1955. And, in Goldberg's opinion, the ads were aimed at young male "starters," first-time smokers.

Goldberg testified that child development literature suggests that young male adolescents are just developing their self-concept, and that they are very self-conscious. They feel that others are equally conscious of them, and want to appear to be mature, strong, independent, and masculine. If they see that a self-confidant, **[18]** virile, and handsome man is smoking a certain brand of cigarette, they are likely to conclude that if they smoke that brand, they will look less fragile and vulnerable than they really are. And when their peers do the same, the cigarette brand acts as a badge and a magnet.

Philip Morris advertised on popular family television shows in the 1950s and 1960s, such as "I Love Lucy," the most popular show in 1955. Other popular prime-time shows on which it advertised were "Red Skelton" and "Jackie Gleason," both comedy shows, "Rawhide," a western, "Perry Mason," a detective show, "Route 66," an adventure drama, "Alfred Hitchcock" and "East Side West Side," suspense and mystery shows. "Rawhide" and

"Route 66" involved characters similar to the masculine images in the ads of that period.

Television advertising has been shown to be very effective, particularly with children. And more than 30 percent of the audience for such shows as "Red Skelton" and "Jackie Gleason" consisted of children, well above the percentage of children in the population.

Goldberg testified that Boeken's inability to recall being influenced by any particular advertisement does not mean that it was not a cause of his smoking. Goldberg described the various media for advertising, and explained that the average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making repetition an important feature in advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become familiar, creating associations in the minds of people who do not think them through. This results in "associative learning," and those influenced by it are unlikely to be aware of it.

Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth **[19]** smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the number of smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because "it's the thing to do."

And, as the Supreme Court recognized in *Mirkin*, as well as prior to *Mirkin*, "'[c]hildren in particular are unlikely to recall the specific advertisements which led them to desire a product. . . .' [Citation.]'" (*Mirkin, supra*, 5 Cal.4th at p. 1099, quoting *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219.) Boeken's testimony bears this out. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. At the age of 12, he made play

cigarettes from gum sticks, rolling them lengthwise. When he was 13 years old, he began to smoke whole, real cigarettes. He did it because "everybody smoked. All adults smoked. It was fashionable. It was sophisticated. It was cool. It was adult. . . . Sports figures smoked. Race car drivers smoked. Everybody smoked. . . . All the kids smoked." Boeken wanted to be grown up. He was at "that age," and that was "the thing to do."

He wanted to smoke even though it was not pleasurable at first — it caused him to feel dizzy, faint, and to cough, and he had to "train" himself to inhale. At first, he smoked whatever brand he could get his hands on, and then he discovered vending machines, which allowed him to pick the brand he wanted. He used the vending machines in the coffee shops across from his junior high and high schools, where a pack of cigarettes cost only 25 cents and no one interfered.

With the discovery of vending machines, Boeken was able to buy a particular brand, and he chose Marlboros, because "[t]hey were everywhere. They advertised everywhere." It was the cigarette of choice in his social set, his culture, and all his friends smoked Marlboros. Marlboro ads seemed to be everywhere — at baseball games, sporting events, racing events, and on racing cars. Boeken **[20]** testified, "I was visually inundated with this brand of cigarette." And he was "impressed by the ads," although he could not recall anything about any particular ads between 1957 and 1960. And no particular advertisement came to mind as a factor in his decision to smoke.

To Boeken, Marlboros represented a very macho, sophisticated, hip way of smoking. He perceived a message that it was the one and only cigarette to smoke. Boeken remembered the 1950s and 1960s as the age of Playboy Magazine, sophistication, machismo, and doing manly things, like smoking cigarettes. In that era, Boeken thought of himself as a "real guy." At the time of his testimony, Boeken picked out several advertisements from the 1960s that looked familiar to him. He remem-

bered the "Marlboro Country" ads, and the slogan, "Come to where the flavor is." Boeken also remembered billboards showing the "Marlboro man" with his lasso, and another with a healthy looking model in great shape jumping over a fence with one hand. Boeken thought that the healthy and robust images in the cowboy ads implied that Marlboros were good for you.

He thought the Marlboro man was a "man's man," like his hero, John Wayne. Boeken rode a motorcycle — is equivalent of John Wayne's horse, and in 1966, at the age 21, he rode around Europe on his motorcycle.

Over the years, another brand's ad campaign occasionally caught Boeken's attention, and he tried it for a few days, but always returned to Marlboros, although he was not sure exactly why. He knew he liked the taste better than other cigarettes — they were smoother, yet stronger. Thus, Boeken started smoking Marlboros as a child for reasons that track Philip Morris's advertising of the time, and he remembered their themes with fair certainty, as well as how they enticed him to smoke with false images of health, sophistication, and machismo. **[21]**

"Substantial evidence means such evidence as a reasonable fact trier might accept as adequate to support a conclusion; evidence which has ponderable legal significance, which is reasonable in nature, credible and of solid value. [Citations.]" (*Guntert v.City of Stockton* (1976) 55 Cal.App.3d 131, 142.) We conclude that the foregoing evidence supports the jury's conclusion that Boeken relied upon advertising by Philip Morris.

We turn now to evidence of Boeken's reliance on the so-called "false controversy."

Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. By the time he was 14 years old in 1957, Boeken was smoking two packs a day, and even more as he got older. By the time he was 15 or 16, Boeken had begun to suffer his first bouts of bronchitis. The doctor gave him antibiotics, but did not tell him to quit smoking. Although his high-school swim

coach told him not to smoke, because it would affect his "wind," meaning endurance, no other teacher told him not to smoke. Most of the teachers smoked, as well. Boeken's mother allowed him to smoke openly at home. She smoked two packs a day herself, and never told him of the dangers of smoking.

Boeken suffered more bouts of bronchitis in his twenties, and by his thirties, he suffered two or three each winter. They were always treated with antibiotics, and no doctor ever told Boeken that they were caused by smoking. Many doctors also smoked at that time. Boeken began to suspect in the mid-seventies that smoking bore some relationship to his bronchitis, but he was unable to stop or even cut down on the number of cigarettes he smoked while he was ill, even when it hurt to inhale.

The Surgeon General warnings went on cigarette packs in the mid-to-late 1960s. Boeken thought that the warnings were "political more than anything else," and that they were required by the government pursuant to some personal vendetta **[22]** of the Surgeon General. He did not even read the Surgeon General's warning until after he filed this action. Boeken explained, "I believed the cigarette advertisements. . . . I didn't think there was anything wrong. . . . I believed they were good for you. I believed everybody smoked them. You're back in the 60's, right?. . . . I didn't believe they were unhealthy."

But Boeken was aware of what he described as a "controversy." He testified that in the 1960s, he heard that the cigarette companies had refuted the fact that cigarettes were addictive, dangerous, harmful, or cancer-causing, and he was aware of a "conflict" over the Surgeon General's warnings. And he relied upon the refutations by the tobacco industry. It was only much later that Boeken discovered there was no *real* controversy. He testified that if Philip Morris had made the real risk of lung cancer and death clear to him in the 1960s, when Philip Morris was instead creating a false controversy with regard to the Surgeon General's report, he would have quit smoking.

In the 1970s, Boeken heard through various news media that tobacco companies claimed that there was no proof or scientific fact that smoking caused cancer, emphysema, or any other lung or blood disease. He trusted them, and believed the harm was being overstated by others. Other than advertisements, however, he could not recall particular statements made by tobacco companies until much later, when tobacco executives falsely testified before Congress in 1994.

By the 1970s, he knew that cigarettes were addictive, and that he was addicted, but he believed the statements by the industry that there was no health risk. The first time that Boeken knew that smoking could cause a catastrophic illness was around 1976, when he had his gallbladder removed, and the doctor told him he could get emphysema. He consulted another doctor, who said, "Forget it. You don't have emphysema. He was playing with you." **[23]**

Boeken tried to stop smoking several times over the years. The first time was in 1967, when his girlfriend gave him an ultimatum. He did not want to lose her, so he stopped; but three or four weeks later, he started again, and she left him. Boeken tried to quit again in 1976, at the beginning of what he termed, "the health craze," when jogging became popular. He wanted to jog too, and he started lifting weights, but he felt he needed stronger "wind." He was unable to stop smoking, however, due to withdrawal andcravings. His withdrawal symptoms consisted of a bad attitude, nastiness, anger, and a huge appetite. He became edgy and snappy, with inappropriate angry reactions.

In 1980, Boeken tried hypnosis to quit. He succeeded for 30 or 40 days, the longest time ever, but he was a "nervous wreck." His first relapse, a cigarette smoked with a cup of coffee, felt like "the best thing that ever happened" to him. In 1982, Boeken attended a Smoke Enders course for three or four weeks, attending three or four times a week. And in 1986 or 1987, he joined Smokers Anonymous, a 12-step program. He was

motivated to quit by more frequent bouts of bronchitis, as well as a continuing desire to run, but he claimed that he still did not know that smoking caused lung cancer. Boeken tried Nicorette gum on more than one occasion, and patches, sometimes both at the same time, but he failed to quit.

After a three-month heroin addiction in the late 1960s, Boeken entered a methadone maintenance program, and quit methadone within three years. In the mid-seventies, Boeken went to Alcoholics Anonymous and stopped drinking in nine months. But he has never been successful at quitting smoking.

In 1981 or 1982, thinking it would lessen his bronchitis, Boeken switched to Marlboro "Lights," because they were lower in tar and nicotine, and "milder." As soon as Philip Morris began to market Marlboro "Ultralights," he switched to those.**[24]**

On the news in 1994, Boeken saw portions of the testimony of tobacco company executives before Congress. They all denied that tobacco was addictive or harmful. They all denied under oath that it caused cancer. He knew they were lying, but at the time, he still believed them, because he did not think they would lie to the government under oath. Also in 1994, Boeken's mother, who smoked two packs a day until her death, died of lung cancer, and he had no more doubts about whether smoking caused cancer. It was much later that he learned for the first time that accelerants, additives, or chemicals were added to the tobacco in his cigarettes, in order to increase their addictiveness.

Even then, Boeken was still unable to quit. In October 1999, he was diagnosed with lung cancer and underwent extremely painful surgery to remove the upper part of a lung, and then he began chemotherapy. By that time, however, the cancer had spread to his lymph nodes, and his chance of surviving the disease was less than one percent. Within a year, the cancer had spread to his brain, and there was no chance of survival.

Boeken stopped smoking just before the surgery to remove part of his lung, but started taking an occasional puff or two after the first round of chemotherapy was over, because it calmed him. But he was shattered when he was diagnosed with brain cancer, and felt he needed more, so he bought a pack of Marlboro Reds, and was soon smoking two or three packs a day.

Boeken testified that if Philip Morris had made it clear to him in the 1960s, the 1970s, or even the 1980s, that cigarettes cause lung cancer and death, he would not have smoked. At least, he thought he would have made an " honest effort" to quit. He also felt that if Philip Morris had admitted in the 1960s or 1970s, not only that smoking caused lung cancer, but also that Philip Morris added ingredients to Marlboro cigarettes in order to increase their addictiveness, he would have stopped smoking Marlboros. **[25]**

The record supports the conclusion of the jury that Boeken, an addicted smoker, was a target of Philip Morris's misrepresentations and that he actually relied upon its campaign of doubt.

B. Substantial Evidence Supports a Finding of Justifiable Reliance

Philip Morris contends that Boeken's reliance upon its fraud was unreasonable and therefore, it suggests, unjustifiable as a matter of law. In support of this contention, Philip Morris relies in part upon Ohio law, as interpreted by a federal trial court in an unpublished memorandum opinion, *Glassner v. R.J. Reynolds Tobacco Co.* (N.D.Ohio Jun.29, 1999) 1999 WL 33591006. Philip Morris claims that the federal court of appeals, in *Glassner v. R.J. Reynolds Tobacco Co.* (6th Cir. 2000) 223 F.3d 343, affirmed the trial court's ruling that as a matter of law, evidence of common knowledge of the dangers of smoking requires a finding that reliance on the tobacco companies' fraud is unjustifiable. Philip Morris misreads the appellate opinion. While the appel-

late court affirmed the judgment, it expressly disagreed with the district court's ruling on justifiable reliance. (See *id.* at p. 353.)

Philip Morris also relies upon Massachusetts law, as interpreted by a federal trial court. (E.g., *Massachusetts Lab. Health & Wel. v. Philip Morris* (D.Mass.1999) 62 F.Supp.2d 236, 244.) That court held that the facts alleged in the complaint filed by a union trust fund did not amount to justifiable reliance as a matter of law, but applied the same objective standard of reasonableness to both intentional misrepresentations and negligent misrepresentations. (See *id.* at p. 244.)

Under California law, which controls in this case, whether reliance was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion. (*Alliance* **[26]** *Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Further, under California law, whether reliance is reasonable in an intentional fraud case is not tested against the "standard of precaution or of minimum knowledge of a hypothetical, reasonable man." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415.)

"Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. [Citations.] 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' [Citation.] If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. [Citations.] 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth. . . .' [Citation.]" (*Seeger v. Odell, supra,* 18 Cal.2d at p. 415.)

As we have discussed, it is presumed that the evidence is sufficient to support the jury's factual

findings, and it is the appellant's burden to demonstrate that it does not. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) And in furtherance of that burden, the appellant must fairly summarize the facts in the light favorable to the judgment. (*Ibid.*) We have previously noted that Philip Morris failed to do so, which results in a forfeiture of the contention. (See *ibid.*)

Notwithstanding the forfeiture, substantial evidence supports a finding that Boeken's reliance was justifiable. The evidence supports the conclusion that Philip Morris knew in the late 1950s, when Richard Boeken started smoking, that cigarettes caused lung cancer. Further, it is reasonable to infer that it also knew by that time, or at least well before 1969, that nicotine was addictive, and that the more nicotine its cigarettes could deliver, the more quickly a smoker would become addicted. Understanding the danger of this information, Philip Morris set **[27]** up its campaign of deception. Boeken testified that his belief in the tobacco companies, rather than the Surgeon General, was wishful thinking or naiveté. But he had believed in the honesty of "big business." Further, Philip Morris had studied and understood nicotine addiction, and from the facts we have previously summarized, it is reasonable to infer that the jury concluded it knew and intended that addicted smokers would reasonably use its misrepresentations and misleading statements to engage in denial and rationalization; and moreover, that smokers' ignorance of the increased addictiveness of Philip Morris's Marlboro brand would keep them smoking Marlboros and ensure their reliance upon such denial and rationalization.

2. *Product Liability*

Philip Morris contends that Boeken failed to prove the elements of product liability, because "[a] defendant . . . may not be held liable for selling a legal product merely because that product is inherently dangerous," without "showing either (1) that the product was improp-

erly designed or manufactured; or (2) that the product lacked appropriate warnings." The problem with this argument is that it does not address all theories of product liability presented to the jury. Thus, even were we to agree with Philip Morris in this argument, the verdict may be affirmed on the basis of the consumer expectations test.[14]

Although denominated, "special verdict," the verdict was a general one, since it contained no findings of fact. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347, fn. 7, 100 Cal.Rptr.2d 446; Code Civ. Proc., §§ 624, 625.) "'[W]here several issues in a cause are tried and submitted to a jury for its determination, a general **[28]** verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error.[Citations.] When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues.' [Citation.]" (*Mouchette v. Board of Education* (1990) 217 Cal.App.3d 303, 315, disapproved on another ground in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 984, fn. 6; see also, *Henderson v. Harnisch-feger Corp.* (1974) 12 Cal.3d 663, 673.)

Substantial evidence supports a finding that Marlboro Lights were a defective product under the consumer expectations test. The consumer expectations test is satisfied when the evidence shows that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.) Some degree of misuse and abuse of the product is foreseeable. (*Huynh v. Ingersoll--*

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[14] Additionally, in light of the fact we have found substantial evidence supports the fraud count, that is sufficient to support the verdict.

Rand (1993) 16 Cal.App.4th 825, 833.)

Dr. Benowitz testified that Marlboro "Lights" and "Ultralights" are not light at all, since they deliver more than 0.1 milligram nicotine and more than 1 milligram tar per cigarette to human smokers who compensate. Compensation occurs when the smoker adjusts the way he or she smokes in order to get a satisfying amount of nicotine, by covering the holes in the filter, sucking harder, drawing the smoke further into the lungs, and keeping it in longer. Benowitz testified that studies have shown that most smokers believe that light cigarettes are safer than regular cigarettes, and the majority of smokers do not know that they compensate. Compensation by smokers draws carcinogens further into the lungs, which is more likely to cause adenocarcinoma of the lung, a more aggressive form of cancer than those more prevalent among smokers of regular strength cigarettes. **[29]**

Philip Morris suggests that the consumer expectations test is, in essence, one for failure to warn, and therefore preempted by the Public Health Cigarette Smoking Act of 1969.[15] Again, we disagree. Product liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test. (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 717.)[16]

We turn to Philip Morris's claims of instructional error.

3. *Civil Code section* 1714.45

Philip Morris contends that Boeken was not entitled to a finding of product liability, whether measured under

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[15] See a more detailed discussion of the 1969 Act, within.

[16] Since smokers do not know they compensate, a warning may not make the product any safer. Philip Morris's own expert, Dr. Richard Carchmann, admitted that the only way to reduce the risk is to quit smoking.

the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.[17]

BAJI No. 9.00.6 is derived from the former version of Civil Code section 1714.45, which provided cigarette manufacturers with immunity from product liability actions.[18] (Stats.1987, ch. 1498, § 3, p. 5778; see *Myers v. Philip Morris* **[30]** *Companies, Inc.* (2002) 28 Cal.4th 828, 837(Myers).) "The statute was originally passed in 1987 and, as pertinent, provided: 'In a product liability action, a manufacturer or seller shall not be liable if: (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.'" (Italics added.)

Thus, as originally enacted in 1987, the statute's enumerated examples of common consumer products included tobacco. (See Stats.1987, ch. 1498, § 3, p. 5778; *Naegele v. R.J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 860-862 (*Naegele*).) It was based upon the position taken in Comment i of Section 402A of the Restatement Second of Torts, that "'a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, in an unadulterated form, a common

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[17] BAJI No. 9.00.6 reads: "The (manufacturer or seller) of a product is not liable for [injuries] [death] caused by a defect in its design, which existed when the product left the possession of the (manufacturer or seller), if: [¶] 1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and [¶] 2. The product is a common consumer product intended for personal consumption."

[18] We shall hereinafter refer to the statute as section 1714.45 or "the immunity statute."

commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers.' [Citation.]" (*Naegele, supra*, 28 Cal.4th at p. 864, italics in the original, underscoring added.)

In 1997, the Legislature amended section 1714.45 to rescind the statutory immunity for tobacco companies as of January 1, 1998. (Stats.1997, ch. 570, § 1; see *Myers, supra*, 28 Cal.4th at pp. 832-833, 837.) Thus, "while the Immunity Statute was in effect — from January 1, 1988, through December 31, 1997 — no tortious liability attached to a tobacco company's production and distribution of pure *and unadulterated* tobacco products to smokers. [Citations.]" (*Myers, supra*, at p. 840, italics added.) **[31]**

The statute was expressly retroactive, and while it was in effect, it immunized tobacco manufacturers from liability for conduct before, as well as during the ten-year period. (*Myers, supra*, 28 Cal.4th at p. 847; *Souders v. Philip Morris Inc.* (2002) 104 Cal.App.4th 15, 24, fn. 7.) Once it was repealed, however, the statute's retroactive effect was nullified, and tobacco companies were no longer immune to liability for conduct occurring prior to 1988.[19] (*Myers, supra*, 28 Cal.4th at p. 847.)

Neither *Myers* nor *Naegele* had been decided when Philip Morris filed its opening brief. In its opening brief, Philip Morris argued that repeal of the original section 1714.45 did not nullify its retroactivity, and that it retained immunity from liability that would otherwise have arisen not only prior to 1998, but also prior to the statute's passage in 1987. Before Philip Morris filed its reply brief, *Naegele* and *Myers* were published. *Myers*

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[19] In *Myers*, the Ninth Circuit Court of Appeals had certified the following question to the California Supreme Court: "Do the amendments to Cal. Civ.Code § 1714.45 that became effective on January 1, 1998, apply to a claim that accrued after January 1, 1998, but which is based on conduct that occurred prior to January 1, 1998?" (*Myers, supra*, 28 Cal.4th at p. 839.)

held that the immunity statute applied to tobacco only during the ten years beginning January 1, 1988 and ending December 31, 1997. (*Myers, supra*, 28 Cal.4th at p. 837.) *Naegele* confirmed this and also held that the protection of the ten-year immunity statute did not "extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (*Naegele, supra*, 28 Cal.4th at p. 861.) Therefore, except for the limited ten-year period, Philip Morris was not entitled to have the jury instructed with BAJI No. 9.00.6. (See Comment to BAJI No. 9.00.6 (Jan. ed.2004); Stats.1997, ch. 570 (S.B.67), § 1.) **[32]**

Although Philip Morris addressed *Naegele* and *Myers* in its reply brief, we permitted it to file a supplemental opening brief. For the first time in its supplemental brief, Philip Morris claims that it requested and submitted a jury instruction that would have limited its liability for any wrongs committed during the ten-year immunity period, proposed special instruction lettered "O."

Philip Morris's packet of proposed jury instructions, filed on May 16, 2001, included that proposed instruction, which reads: "You may not find defendant liable on plaintiff's claims of design defect, negligence, fraud and conspiracy or failure to warn based on anything that defendant did or did not do between January 1, 1988, and December 31, 1997. It was the policy of California during that period to recognize cigarettes as inherently unsafe products that could nevertheless be lawfully sold because they carried adequate warnings regarding their dangers, and to encourage the continued availability of cigarettes and other tobacco products to those adult consumers who wished to use them. This was accomplished by a law that protected producers or suppliers of cigarettes or other tobacco products from legal responsibility for harms suffered by those who voluntarily consumed such products. That law was repealed as of January 1, 1998, and has no legal effect with respect to

conduct since that date, and also has no legal effect with respect to plaintiff's claim for breach of express warranty."

The problem we have is that we have found no ruling by the trial court rejecting this instruction. The instruction conference was unreported. We did find a cover sheet signed by the trial judge, and file-stamped June 6, 2001, which is entitled, "Instructions — Refused Withdrawn, Consisting of 10 pages herein." But the ten pages are not attached, unless the cover sheet was meant to refer to the ten pages attached to the document immediately following it in the Clerk's Transcript.

The document immediately following the trial court's cover sheet is entitled, "Objections of Defendant Philip Morris Incorporated to Court's Rejection of **[33]** Certain Jury Instructions Proposed by Defendant." The ten pages that follow contain seven proposed instructions. Proposed Instruction O is not among them.

We requested Philip Morris to provide us with the exact page numbers in the appellate record where the trial court's refusal to give its proposed Instruction O might be found, or to augment the record with a copy of the trial court's minute order or additional reporter's transcript, if any, showing the refusal, or to inform this court if there was no such order or ruling. Rather than directly respond to our request, Philip Morris filed a letter brief suggesting that we must assume that the instruction was requested and rejected, *because the record is silent* with regard to an express ruling, and the instruction conference was in chambers. As authority for its suggestion, Philip Morris states that it knows of no authority to the contrary. In fact, there is no shortage of authority to the contrary. It is well established that error cannot be presumed, and it is the appellant's burden to provide a record sufficient to show the asserted error. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Rossiter v. Benoit* (1979)88 Cal.App.3d 706, 712.)

Relying upon language in *Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, Philip

Morris contends that we must assume that it requested and the court rejected the instruction, even absent a record of the ruling. In that case, we were satisfied that certain instructions were, in fact, requested but refused, although there was no discussion between court and counsel in the record. (See *id.* at p. 1379, fn. 3.) But we did not enunciate a rule that whenever the instruction conference is unrecorded, it must be assumed that a particular instruction has been requested and refused.

Here, the evidence is that the instruction was in the *proposed* packet filed on May 16, 2001. But we cannot conclude Philip Morris actually requested that the court instruct the jury with it. Rather, the inference from the record is that for tactical reasons the instruction was either withdrawn or not proffered to the court [**34**] by Philip Morris. This inference is consistent with the fact that instruction O was not attached to the "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant." It is also consistent with the legal position asserted by Philip Morris at trial, and in its opening brief on appeal: that the statute immunized it from liability for all conduct prior to January 1, 1998, including all conduct preceding January 1, 1988, not just for the ten year period the statute was in force. A party is not entitled to instructions with regard to a theory or defense that the party has *not advanced*. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

Philip Morris also filed a motion to augment the record, but not with an agreed or settled statement reflecting the in camera instruction conference or any ruling on the instructions. (See *Maria P. v. Riles, supra,* 43 Cal.3d at p. 1295; *In re Kathy P.* (1979) 25 Cal.3d 91, 102; Cal. Rules of Court, rules 6, 7, 12(a).) Instead, Philip Morris seeks to augment the record with the trial court's statement of decision regarding Philip Morris's pretrial motion for summary adjudication, in an attempt to show that requesting an instruction or a ruling on the proposed instruction would have been futile, because the

trial court had already ruled against it on that issue. We grant the motion, because the statement of decision was part of the trial court record. But we find the statement of decision consistent with our inference. It discloses the claim by Philip Morris of immunity for all pre-1998 conduct, not just conduct between 1988 to 1998.

We also note that instruction O was incomplete because it did not incorporate the term "unadulterated" within its language. Philip Morris argues that the omission was so minor as to require the trial court to modify the instruction. We disagree. "A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial **[35]** judge may . . . properly refuse it. [Citations.]" (*Truman v. Thomas* (1980) 27 Cal.3d 285, 301.)

Philip Morris states in its reply brief that "there is no evidence that Philip Morris, during the 1960s or at any other time, was adding things to Marlboro cigarettes . . . for the purpose of addicting plaintiff or any other smoker." In fact, there is more than ample evidence in the record, as previously discussed, that Philip Morris incorporated additives that not only increased the risk of harm from nicotine, but also created harmful effects not inherent in smoking unadulterated tobacco.

The evidence also established, contrary to Philip Morris's assertions, that additives contributed to Boeken's lung cancer. By the age of 14, Boeken smoked every day, at least two packs a day, and continued for 40 years, unable to quit for more than a brief period even after he was diagnosed with lung cancer. According to Benowitz, Boeken was not just addicted to cigarettes, he was highly addicted. The increased ammonia had done its job of addicting more effectively and more quickly.

Further, Farone testified that 20 percent of the contents of a cigarette consists of added flavorings. Flavorings such as chocolate and licorice are not added simply to improve the taste, but also to make it easier to inhale the smoke by creating bronchodilators, which

open up the lungs. Cigarettes that are easier to smoke allow carcinogens to reach deeper into the lungs, which can lead to adenocarcinoma, the very aggressive and fast-spreading cancer from which Boeken suffered.

Epidemiologist and oncologist, Gary Strauss, explained that when cigarettes are more irritating, people do not inhale deeply, and the central part of the lungs is the area primarily exposed to cancer-causing particulates. The more deadly adenocarcinomas, however, grow in the periphery, that is, the end of the lung, **[36]** reached by deeper inhaling. The incidence of these cancers has increased in recent years and that increase is attributable to low-tar cigarettes.

We conclude that even if Philip Morris did not withdraw Proposed Instruction O, and the court did refuse to give the instruction, the court did not err.

4. *Federal Preemption Contentions*

Philip Morris contends that certain evidence, argument, and claims were preempted by the Public Health Cigarette Smoking Act of 1969, and that the trial court failed to instruct the jury properly "on this point." Its contentions are twofold: (1) the trial court erred by refusing to "instruct the jury, as Philip Morris requested, that it could not hold Philip Morris liable on the ground that its post-1969 advertising contained supposedly 'glamorous' and 'healthy' imagery"; and (2) that the trial court erroneously "admitted, over Philip Morris's objection, evidence that Philip Morris's advertising contained such imagery."

The 1969 Act requires a particular warning, or a variation of it, to appear in a conspicuous place on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone, supra*, 505 U.S. at pp. 515- 518, 525.) It also explicitly reserves authority to The Federal Trade Commission to identify and punish deceptive advertising practices relating to smoking and health. (*Cipollone, supra*, at p. 529; 15 U.S.C. § 1336.)

The United States Supreme Court has construed the 1969 Act as preempting damage claims based upon a failure-to-warn theory that requires a showing that post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, or that its advertising tended to minimize or neutralize the health hazards associated with smoking. (*Cipollone, supra*, 505 U.S. at pp. 524, 527-528.)

We first address the second contention of Philip Morris: that the trial court erred in permitting Dr. Goldberg to testify at length and over its objection about **[37]** preempted, post-1969 advertising. In that testimony, which took place on April 17, 2001, Goldberg referred to several exhibits which have not been made a part of the record on appeal. He described them as advertisements that demonstrate an intent to market Marlboro cigarettes to adolescent males, and to turn youthful nonsmokers into smokers.

Philip Morris fails to identify a specific objection it made in connection with this testimony. A judgment may not be reversed unless the record shows that the appellant made a timely objection to or a motion to exclude or to strike the evidence and that the specific ground of the objection or motion was stated. (Evid.Code, § 353, subd. (a).)

Philip Morris contends that its objection was made in its motion in limine No. 1, which stated a general objection to any and all evidence that might relate to preempted advertising. Philip Morris's motion in limine did not, however, specify any particular evidence to be excluded, and did not mention the Goldberg testimony about which it now complains.

A motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence and was made at a time when the trial court could determine the evidentiary question in its appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830,

fn. 1.) Thus, Philip Morris's motion in limine did not preserve the issue for appeal.

Philip Morris also contends that the court gave it a "running objection . . . to this whole area." The court allowed Philip Morris a "running objection" in a discussion which took place the day before the Goldberg testimony now in question, and although it does appear that the court may have been referring to evidence of preempted advertising, the discussion on that day was precipitated by Philip Morris's objection *on the ground of relevance* to testimony concerning the **[38]** targeting of youthful smokers after Boeken became an adult. Philip Morris's counsel, Mr. Leiter, made it clear to the court that *he was not objecting to post-*1969 *youth-targeted advertising on the ground of federal preemption.*

On the day at issue, April 17, 2001, after Goldberg read an excerpt from an article about youth smoking, Leiter said, "Your Honor, may we have our standing objection," but he did not explain what standing objection he had in mind. The judge assented, apparently thinking that he understood to which objection counsel was referring, and he then took the matter up outside the jury's presence. The ensuing discussion began in relation to targeting youth smokers, and the court referred to a discussion of the subject the day before, April 16, 2001.

In the April 17 discussion, it was again the court that brought up the issue of preemption. Counsel for Boeken offered to stipulate to having the court strike the article from which Goldberg had read. Leiter responded that he would prefer a limiting instruction, either at that time or later in the trial, regarding the proper use of the testimony and warning against the improper use of it under *Cipollone*. The court agreed to give such an instruction once it had "an appropriately written jury instruction" before it. Leiter agreed, with the understanding that he continue to have "a standing objection to all such testimony." The court replied, "You do, you do," and ruled that the "current information with the exception of erosion type suggestions" was relevant to an understand-

ing of what occurred in the 1950s, when Boeken started smoking.

Thus, it appears that Philip Morris did not object to the Goldberg testimony regarding post-1969 advertisements, and whatever its vague "running" or "standing" objection was, it was not "directed to a particular, identifiable body of evidence," and therefore did not comply with Evidence Code section 353, subdivision (a). (*People v. Morris, supra*, 53 Cal.3d at pp. 188-190.) The testimony to which Philip Morris did object concerned an excerpt from an article **[39]** regarding the targeting of youth smokers, and Philip Morris refused an offer to stipulate to the court's striking that testimony, agreeing instead upon a limiting instruction to be submitted in writing. Even if Philip Morris could bootstrap its objection to the reading of the article into an objection to the testimony that preceded it, it may not complain on appeal about the admission of evidence that it induced the court not to strike. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) We conclude that Philip Morris has not preserved the issue for appeal.[20]

We turn to Philip Morris's claim that it requested two instructions relating to federally preempted advertising, and that the trial court refused both requests. The first of the two instructions at issue was requested *orally* during the testimony of Boeken's expert on nicotine addiction, Benowitz. Philip Morris has summarized neither the testimony nor its discussion with the court, has not put its request for this instruction in context, and has not

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[20] On rehearing, Philip Morris contends that we erroneously interpreted the running objection as relating to youth marketing, rather than evidence of preempted neutralization claims. Philip Morris still does not identify a particular, identifiable body of evidence, whether it is evidence of preempted neutralization, youth marketing, or some other theory. An objection to "this whole area," even if clearly based upon *Cipollone, supra*, 505 U.S. at pp. 524, 527-528, does not preserve the issue for appeal. (Cf., *People v. Morris, supra*, 53 Cal.3d at pp.188-190.)

summarized the court's ruling, which was not simply a refusal to give a requested instruction, as we shall explain. We begin with a summary of the relevant portions of the record.

Philip Morris objected during Benowitz's testimony regarding the use of healthy, sexy, happy models in advertisements, and moved for a mistrial. The court disagreed with that characterization of the testimony, and denied the mistrial, but offered to instruct the jury to disregard whatever it had heard from this particular witness with regard to advertisements. Philip Morris's counsel, Mr. Leiter, replied, "We would ask that the court affirmatively instruct the jury that it **[40]** may not find liability in this case based on any accusation or any evidence that healthy images in ads undercut the health warnings mandated by the Congress."

The court refused to give this specifically requested language. But contrary to Philip Morris's suggestion that no instruction was given on the issue, the court did instruct as follows: "Ladies and gentlemen, just before we took the break, there was some testimony from this witness regarding certain advertising images and their potential effects. You'll recall that testimony. [¶] I instruct you at this time that with respect to that testimony, I want you to *disregard it for all purposes and do not use it for any purpose whatsoever* in this trial." (Italics added.) Since Philip Morris has referred to nothing to the contrary, we presume the jury followed the court's instruction. (See *People v. Harris* (1994) 9 Cal.4th 407, 426.)

The second instruction that Philip Morris claims the court erroneously refused was its proposed instruction J.[21]

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[21] The proposed instruction reads as follows: "Regardless of any of the other rules of law set forth in these instructions, you must follow the rules of federal law which I shall now give you. [¶] Because of federal law, you cannot hold defendant liable on the basis that after July 1, 1969, it should have included additional or more clearly-stated warnings in the advertising or promotion of [its] cigarettes

As with Proposed Instruction No. O, we find no ruling by the trial court rejecting this instruction. Our request for a citation to the record for the trial **[41]** court's purported refusal of Instruction No. O also included a request for a citation to the court's purported refusal of Philip Morris's proposed Instruction No. J. Philip Morris has provided no such citation, and has not attempted to augment the record with an agreed or settled statement. (See *Maria P. v. Riles, supra*, 43 Cal.3d at p.1295; *In re Kathy P., supra*, 25 Cal.3d at p. 102; Cal. Rules of Court, rules 6, 7, 12(a).) But we did find Proposed Instruction J in the group of instructions under cover of the "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant."

If the trial court did, in fact, refuse Instruction No. J, Philip Morris has failed to demonstrate error. A trial court is not required to give instructions in the precise language proposed, and it is not error to refuse instructions that are not reasonably brief, concise, and understandable to the average juror. (*Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764.)

"Proposed instructions which are argumentative and misleading should not be given. [Citation.] Instructions should not draw the jury's attention to particular facts. It

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because, as a matter of federal law, after July 1, 1969, defendant adequately warned plaintiff of the health risks of smoking, including 'addiction.' [¶] Also because of federal law, and except only as stated below, you cannot hold defendant liable on the basis that it: [¶] (a) through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings appearing on every cigarette package after July 1, 1969, or [¶] (b) after July 1, 1969, failed to disclose, or concealed, or suppressed information about the health risks of smoking including 'addiction.' [¶] The federal law does not limit the potential liability of defendant against claims that its product was defective in design in other respects, or that the defendant was negligent in other respects in the design of their product. The federal law also does not limit the potential liability of defendant against claims that it made affirmative misrepre-sentations about the health risks of smoking."

is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] . . .Repetitious reference, in the instructions, that under the circumstances related the jury 'must find in favor . . . of defendant' has been condemned. [Citation.]" (*Dodge v. San Diego Electric Ry. Co., supra*, 92 Cal.App.2d at p. 764, 208 P.2d 37.) Instruction J suffered from all these infirmities, and the trial court had no duty to give it.

In any event, "[n]o judgment shall be set aside . . . on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court **[42]** shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI,§ 13.) The burden is on Philip Morris, as appellant, to show that error has resulted in a miscarriage of justice. (*Cucinella v. Weston Biscuit Co., supra*, 42 Cal.2d at p. 83.) Philip Morris has failed to so demonstrate.

In fact, the trial court instructed the jury regarding the 1969 limitations throughout its charge to the jury. With regard to fraudulent concealment, the court instructed, "[F]ailure to disclose . . . is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose . . . prior to July 1, 1969." The special verdict form asked, "Prior to July 1, 1969, did defendant conceal or suppress a material fact?"

With regard to the product liability claim, the court instructed, "A product may be defective because of a defect in design or a failure to adequately warn the consumer prior to July 1, 1969"; and, "[A] product is defective if the manufacturer . . . has a duty to warn of dangers and fails to provide an adequate warning of those dangers prior to July 1, 1969, a date established by law in this case"; and, "A cigarette manufacturer has a duty to warn prior to July 1, 1969 if [etc.]"; and, "For the period

prior to July 1, 1969, one who supplied a product . . . has *a duty to use reasonable care to give warning.*"

Further, the special verdict form asked, "Was there either (1) a defect in design, or (2) a defect resulting from a failure to warn occurring before July 1, 1969?"

Thus, the jury was not permitted, as Philip Morris contends, to base liability upon a failure to warn after July 1, 1969, or upon advertising that minimized or neutralized the federally mandated warning after that date.

Philip Morris complains that opposing counsel was permitted to argue that Philip Morris was the "'devil' because of its allegedly glamorous advertising **[43]** practices"; that Philip Morris "'spent hundreds of millions and billions of dollars putting out advertising images to the exact contrary' of the dangers of smoking"; that "'Marlboro is on the side of Ferraris in Formula One Racing [and] guys, especially, who see themselves, adventurous or resourceful or strong go for that.' Mr. Boeken did. He saw himself as that man."

If opposing counsel's argument tended to minimize or neutralize federally mandated warnings, it was incumbent upon Philip Morris to object and request that the jury be admonished. (See *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318.) Since it did not do so, it waived any contention based upon improper argument. (*Id.* at p. 318; *Horn v. Atchison T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.)[22]

We conclude that Philip Morris has failed to meet its burden to show that the trial court erred by refusing its instructions, as well as its burden to show that any such refusal amounted to a miscarriage of justice.

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[22] For the first time on rehearing, Philip Morris contends that the purpose of its proposed instruction No. J was to be an admonishment. Since there is no language in the instruction directed at opposing counsel's argument, this argument appears to be merely an afterthought.

5. *Youth-Targeting*

Citing *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057 (*Mangini*) and *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525 (*Reilly*), Philip Morris contends that the trial court erred in permitting counsel for Boeken to argue repeatedly to the jury that Philip Morris targeted youth in its advertising, and in failing to instruct the jury that it could not consider evidence of such advertising. **[44]**

The jury began its deliberations on May 22, 2001, and returned its verdict on June 6, 2001. On those dates, the California Supreme Court's opinion in *Mangini* had not yet been called into doubt by the United States Supreme Court's opinion in *Reilly*, which was published on June 28, 2001.

Mangini held that an unfair competition action seeking to enjoin youth-targeted advertising was not pre-empted by the 1969 Act, because such advertising was "not 'based on smoking and health'; [but] 'the more general duty not to' unfairly assist or advertise illegal conduct [selling cigarettes to minors]. [Citation.]" (*Mangini, supra*, 7 Cal.4th at p. 1069, quoting *Cipollone, supra*, 505 U.S. at p. 529.)

Reilly concerned a Massachusetts law that prohibited outdoor advertising and regulated point-of-sale advertising of cigarettes and other tobacco products "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." (*Reilly, supra*, 533 U.S. at p. 535.) The United States Supreme court did not perceive a "distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns." (*Reilly*, 533 U.S. at pp. 550-551.)

The Court also found no "distinction between state regulation of the location as opposed to the content of cigarette advertising . . . in the text of the pre-emption

provision. Congress pre-empted state cigarette advertising regulations . . . because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. Accordingly, [the Court held] that the [Massachusetts] outdoor and point-of-sale advertising regulations targeting **[45]** cigarettes are pre-empted by the FCLAA [the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.]." (*Reilly*, 533 U.S. at p. 551.)

Although no claim in this case was based upon post-1969 advertising, Philip Morris contends that the improper argument of counsel permitted the jury to assess punitive damages based upon evidence of post-1969 youth-targeted advertising. It argues that any objection would have been futile because the reasoning of *Mangini* would have permitted such evidence and argument and it was not until after trial was concluded that *Reilly* effectively overruled *Mangini*.

To the extent that Philip Morris's contention is, in effect, an evidentiary challenge, such "challenges are usually waived unless timely raised in the trial court, [unless] the pertinent law later changed so *unforeseeably* that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703, italics added.)

And where a party fails to request a limiting instruction with regard to the admissibility of evidence that the law did not deem inadmissible until after trial, the issue may be raised on appeal if neither trial counsel nor the trial judge had *any way of knowing* that the Supreme Court would act as it did. (*People v. Vinson* (1969) 268 Cal.App.2d 672, 675.) "A contrary holding would place an unreasonable burden on defendants to anticipate *unforeseen* changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule . . . would be changed on appeal." (*People v. Kitchens* (1956) 46 Cal.2d 260, 263, italics added.)

Philip Morris does not suggest that it had no way of knowing that the United States Supreme Court would issue an opinion in which it would conclude that liability based upon post-1969 youth-targeted advertising was preempted by federal law. Nor does it suggest that the implicit overruling of *Mangini* by *Reilly* was unforeseen by Philip Morris. Indeed, Philip Morris was a party to the district [**46**] court case reviewed in *Reilly*, and one of the petitioners in *Reilly*. (See e.g., *Reilly, supra*, 533 U.S. 525; *Consolidated Cigar Corp. v. Reilly* (1st Cir.Mass.2000) 218 F.3d 30.)[23] Thus, Philip Morris may not rely upon the futility of objecting or requesting a limiting instruction.

And we would find no error in allowing Boeken's counsel to argue as he did, even if *Reilly* had been published prior to trial. Boeken's counsel did not argue, as Philip Morris suggests, that the jury should consider such advertisement to justify a greater punitive damage award. Counsel's argument was in response to evidence and argument presented by Philip Morris with regard to youth marketing.

Ellen Merlo, Senior Vice President of Corporate Affairs at Philip Morris, and a member of the management team responsible for community relations, public affairs, and corporate responsibility programs, testified on behalf of Philip Morris that "We sincerely don't want kids to smoke." Merlo claimed that not only did Philip Morris not market to minors, but worked affirmatively to prevent them from smoking. In April 1998, Philip Morris created a new department, its Youth Smoking Prevention Department, which has devoted over $100 million per year to anti-smoking measures. For example, since the Superbowl reaches the largest number of 9 to 14 year-olds in the season, Philip Morris ran anti-smoking ads on the telecast of the 2000 Superbowl. While much of the money is spent

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[23] We take judicial notice on our own motion of the United States Supreme Court docket in *Lorillard Tobacco Co. v. Reilly*, Case No. 00-596. (See Evid.Code, § 452, subd. (d).) The docket may be viewed at http://www.supremecourtus.gov/docket/00-596.htm.

on advertising, the department also funds grants, such as to 4-H, to develop youth anti-smoking programs. Philip Morris also undertook a campaign to urge parents [47] and older siblings to be more responsible in where they leave their tobacco and not to purchase cigarettes for minors.

Merlo also claimed that Philip Morris punishes retailers who have been convicted or fined for selling its products to minors. Philip Morris has agreements with retailers under which the retailers are paid to display and sell its products. Upon the first conviction, Philip Morris withdraws payment for one month; upon the second conviction, four months; and upon the third conviction, two years. Since 1995, several thousand retailers have been punished, some of them losing thousands of dollars in withheld payments.

In addition, Merlo testified, Philip Morris advocates a policy of keeping its merchandise behind the counter, discourages retailers from placing cigarettes or advertising at children's eye level or near the candy, does not sell its products by mail or over the internet, since it is impossible to check the age of the buyer, and it has stopped giving free samples.[24]

Merlo explained that in 1997, when Mike Szymanczyk became CEO of Philip Morris U.S.A., Philip Morris changed its approach, in order to "become responsible and to earn back some credibility." He therefore adopted the Surgeon General's position, created a mission with a "set of core values that would guide the company and then to set some very specific goals . . . as we moved forward." The new mission statement expressed the company's goal "to be the most responsible, effective and respected developer, manufacturer [and] marketing the best quality tobacco products available to adults who choose to use them." One way to attain that goal is to take "a proactive and active

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[24] Sampling was outlawed in California in 1995. (Health & Saf.Code, § 11895.)

stance in dealing with the issue of youth smoking prevention." **[48]**

In closing argument, counsel for Philip Morris urged the jurors not to decide the case based upon anger, bias, or emotion, or to "go into that jury room and hammer [Philip Morris]," because, he argued, Philip Morris is "doing things differently now." Counsel referred to Merlo's testimony, acknowledged that the company had made mistakes over the years, and pointed out that it was trying very hard to make changes and to sell its product in a responsible way.

Thus, without expressly mentioning punitive damages, it appears that the strategy of Philip Morris was to show there was no need for punishment, since it had changed the policies that led to Boeken's nicotine addiction. Philip Morris may not complain of the admission of evidence it offered itself. (*Gjurich v. Fieg* (1913) 164 Cal. 429, 433.)

Because Philip Morris presented the testimony of Merlo, Boeken's counsel was entitled to comment upon the evidence in argument. (See *People v. Mincey* (1992) 2 Cal.4th 408, 446.) This is just what Piuze did when he said "[I]f Philip Morris gives up targeting teenage smokers, Philip Morris will literally be out of the tobacco business," and, "Philip Morris isn't giving up targeting teenage smokers." Just preceding the comments, and not quoted by Philip Morris, Piuze said, "I hope to be able to show . . . that *despite evidence here and proclamations here from Philip Morris to the contrary*, they cannot give up targeting teenage smokers." (Italics added.)

Similarly, Philip Morris complains of comments at page 5900 of the reporter's transcripts, although it does not quote them in its briefs, where Piuze urged the jury not to believe Philip Morris's evidence. He said, "Ellen Merlo saying, we will stop selling to kids and targeting kids is like that guy in 1954 saying, if this product is harmful, we'll stop, we'll [get] out of the tobacco **[49]**

business."[25] Philip Morris also complains about the argument on pages 6222, 6224, and 6225 of the reporter's transcript. Again, Piuze was urging the jury not to believe Merlo's testimony.

Where a party has "'opened the door'" on an area, it is estopped from complaining that its opponent has profited by it. (*Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 32; see also, *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555.)

Counsel is accorded wide latitude in arguing his case to a jury, and "'"has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom."'" (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798-799 (*Grimshaw*).) Thus, even if Philip Morris had objected to the remarks, the court would not have erred by overruling the objection.

6. *Impeachment with Felony Conviction*

Philip Morris contends that the trial court abused its discretion in refusing to allow it to impeach Boeken with a 1992 felony wire fraud conviction. Boeken brought a motion in limine to exclude any reference to his three criminal convictions, one in 1972 for receiving stolen property, one in 1976 for possession of heroin, and the 1992 wire fraud conviction. With regard to the latter, Boeken had been convicted after pleading guilty in a plea bargain to one count of wire fraud as an aider and abettor. (See 18 U.S.C. §§ 1343, 2(a).) He admitted **[50]** having sold a fraudulent investment in 1987 while employed as a securities salesman.

The motion in limine was granted, *without* prejudice, after which the following exchange occurred:

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[25] The 1998 deposition testimony of former Philip Morris CEO Geoffrey Bible in another case was read to the jury. He testified that he did not know whether anybody had died as a result of smoking, and if he thought someone had died because of his product, he would shut down the business.

THE COURT: At this time, what I will do is will grant the motion in limine in its entirety as to the felony convictions and they will not be admitted for any purpose, nor will counsel refer to it in any way, either directly or indirectly, through counsel or through any witnesses that may take the stand.

"It's without prejudice.

"If we get very far into any character issues

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"MR. LEITER: And by suggesting we defer it, I hadn't anticipated Your Honor was going to rule.

"THE COURT: I know you did.

"MR. LEITER: Obviously, credibility of the plaintiff is a key issue in the case. Income is a key issue in the case. And the conviction goes to both. And we would like to be heard on both of those issues, either now or at the appropriate time.

"THE COURT: All I can say to you is that I am certainly willing to listen. But based on the information that I have at the present time that's been presented to me in this motion in limine, I looked at it, I thought about it long and hard, balanced the 352 issues, it turns out from what I have seen so far, I am satisfied that I made--that my instincts led me in the right direction and it was correct not to admit this evidence and that it would have been the very effects that 352 is designed to prevent occurring in a trial.

"But at the same time, I haven't seen everything, and there must be a certain amount of openness. But at the present time, this motion is granted." **[51]**

Despite the fact the ruling was without prejudice, Philip Morris did not attempt to resurrect the issue again until its motion for new trial. It now contends that the court abused its discretion in excluding the conviction for three reasons: it was not too remote; fraud is probative on

the issue of credibility; and Boeken's veracity was a "central issue."

The trial court's determination whether to admit or exclude a prior felony conviction for purposes of impeachment was made pursuant to Evidence Code section 352. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.) Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"If a proper objection under section 352 is raised, the record must affirmatively demonstrate that the trial court did in fact weigh prejudice against probative value. The trial court need not make findings or expressly recite its weighing process, or even expressly recite that it has weighed the factors, so long as the record as a whole shows the court understood and undertook its obligation to perform the weighing function. [Citations.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599.) An exercise of discretion under section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

We agree that a fraud conviction is probative with regard to credibility. But Philip Morris has not shown that its exclusion was arbitrary, capricious, or patently absurd, or that it resulted in a manifest miscarriage of justice. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) Notably absent from Philip Morris's **[52]** argument is any contention that the probative value of the conviction might outweigh the consumption of time that would have been taken up by the issue.

7. *Juror Misconduct*

Philip Morris contends that the trial court erred in removing a juror during deliberations.

The trial court's discretion to discharge a juror who refuses to deliberate is reviewed for abuse of discretion and will be upheld if there is any substantial evidence supporting the ruling, so long as the juror's refusal to deliberate appears in the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474-475.)

On the morning of May 23, 2001, one day into deliberations, the foreperson sent out two notes to the judge stating, among other things: "We . . . need instruction regarding Juror # 5 . . . who is not participating in the discussion. She sits away from the table and reads her bible instead of contributing to the group conversation"; and, "Can we discuss the distraction regarding Juror # 5. . . . She is not seating [*sic*] with us during the discussion. She instead chooses to read her bible and does not contribute to the group conversation."[26]

In response to the note, the court reread to the jury the following excerpt from BAJI No. 15.52: "All jurors should participate in all deliberations."

Later, the foreperson sent out another note. "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This **[53]** distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [*sic*] with [Juror No. 5] about this."

The court then questioned Juror No. 5 separately in chambers. She denied that she had been reading her Bible during deliberations, although she kept it in front of her. She admitted that she did not sit "all the way up" at the

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[26] The record is not clear on the timing and sequence of the various notes.

table, but denied that she sat away from the table, failed to listen, or slept during deliberations.

Juror No. 5 explained to the court that questions had been raised in the jury room about her addiction to morphine, and she found that avoiding eye contact helped her to avoid painful memories. She did this for "[her] own sanity." She then admitted that she had been sitting in the corner, explaining that she could not be expected to sit there and "giggly-gaggly play little games," because she was "not that hypocritical."

The trial judge urged Juror No. 5 to participate, to explain her concerns to the other jurors, and to ask them to be courteous, since they probably would attempt to get along if they understood her feelings. Juror No. 5 responded that she got along with individual jurors, but "now it is like them against me." The judge explained that deliberating means listening, sharing her views, and participating. Juror No. 5 replied, "I totally agree. I have attempted to do that." She agreed to go back in, talk to the other jurors, and to try to "square it away."

Later that day, however, the foreperson sent out another note, which read: "Wish to speak with the judge on a one and one basis regarding [Juror No. 5]. We feel that she is being disruptive and have [*sic*] shown animosity towards some of the jurors who has [*sic*] spoken to her regarding the reading and participation"; and, "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is **[54]** upsetting the other jurors. This distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [*sic*] with [Juror No. 5] about this."

The court then undertook to question each juror individually in chambers. The judge was careful to caution each juror not to reveal the contents of deliberations, and asked for any comments about the information he had received regarding some difficulty concerning one of the jurors.

Juror No. 2 reported that the trouble began after Juror No. 5 became angry when she was not elected foreperson. It appeared to Juror No. 11 that Juror No. 5's personality totally changed once the foreperson was picked. Juror No. 6, the foreperson, reported that Juror No. 5 participated until she failed to win election as foreperson. She then became hostile, and warned Juror No. 6 that she would "shut it down" if she were not left alone.

Six jurors reported that Juror No. 5 would sit with her back turned against the other jurors, and Juror No. 5 admitted turning her chair around and sitting with her back to the other jurors on both days of deliberations.

Juror No. 1 reported that Juror No. 5 would not sit with the others, and that she either read her book or appeared to sleep during deliberations. Five more jurors reported either that Juror No. 5 appeared to be sleeping much of the time, or she sat with her eyes closed.

Jurors No. 7, 8, and 9 reported that Juror No. 5 never looked at the exhibits, and the latter two reported that she did not review her notes. Eleven jurors reported that Juror No. 5 read her book while the others deliberated. Juror No. 5 admitted that she read a novel (not the Bible) during deliberations, although she then claimed that she was not actually reading. Juror No. 11 thought that Juror No. 5 was, in fact, reading, since she smiled occasionally while looking at her book, and the smile obviously did not relate to any discussion among the other jurors. **[55]**

Ignoring the reports we have just summarized, Philip Morris points to comments by several jurors, including Juror No. 5, which would have supported a contrary resolution of the issue by the trial court. But we must accept the trial court's resolution of credibility issues and factual conflicts, unless they are not supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Philip Morris also attaches to its opening brief a declaration of Juror No. 5 dated June 7, 2001, and a letter from one of the other jurors, posted on the Internet on

June 23, 2001. These exhibits add nothing to the pre-verdict evidence other than the mental processes of the two jurors. They may not be used impeach the verdict. (See Evid.Code, § 1150.)

Philip Morris suggests that the facts of this case are similar to those of *People v. Bowers* (2001) 87 Cal.App.4th 722 (*Bowers*), which were held to justify a reversal. (See *id.* at p. 735.) We disagree. In *Bowers*, only one other juror reported that the discharged juror had slept, and there was no evidence of how long or how frequently. (*Id.* at p. 731.) Here, all the other jurors reported that Juror No. 5 appeared to sleep or read throughout the two days of deliberations.

In *Bowers*, behavior reported as inattentiveness consisted of the juror's habit of walking around with his arms crossed and refusing to respond, as a means of expressing that he did not agree with the other jurors' evaluation of the evidence. (*Bowers, supra*, 87 Cal. App.4th at pp. 730-731.) Here, substantial evidence established that Juror No. 5 separated herself physically from the other jurors, did not pay attention to their deliberations, and instead, slept or read a novel, the Bible, or both, throughout the two days during which she was a member of the deliberating jury.

We conclude that such circumstances support a finding of a "demonstrable reality" that Juror No.5 refused or was unable to deliberate, and that the trial court **[56]** did not, therefore, abuse its discretion in discharging her. (See *People v. Cleveland, supra*, 25 Cal.4th at p. 484.)

8. *Punitive Damages*

Philip Morris moved for a new trial on the jury's award of $3 billion in punitive damages. The trial court denied the motion, conditioned upon Boeken's acceptance of a reduction of punitive damages to $100 million. Boeken accepted the reduction. Philip Morris contends that even the reduced punitive damage award is excessive, under both California law and the United States Constitution.

In her cross-appeal, Boeken contends that the trial court erred in reducing the award. We begin by reviewing the applicable law.

In California, punitive damages may be awarded by a jury where clear and convincing evidence establishes a defendant is guilty of "oppression, fraud, or malice . . . for the sake of example and by way of punishing the defendant." (Civ.Code, § 3294, subd. (a).)

"The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts. [Citations.]" (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13.) *Neal* reiterates the California standard to determine if an award is excessive:

> "As we pointed out in *Bertero v. National General Corp.* [(1974)] 13 Cal.3d 43, our review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorable to the judgment, indicates *were rendered as the result of passion and prejudice* . . . .' [Citation.]" (*Id.* at p. 927, italics added.) **[57]**

Neal listed three factors to consider in reviewing whether an award is excessive: (1) the *reprehensibility* of the acts of the defendant in light of the record as a whole; (2) the amount of *compensatory damages* awarded; and (3) the *wealth* of the particular defendant. (*Neal, supra*, 21 Cal.3d at p. 928.) These factors were reiterated in *Adams v. Murakami* (1991) 54 Cal.3d 105, 109-110.

In California, a trial court reviews a motion challenging the excessiveness of an award of punitive damages similar to other motions for new trial, as a "thirteenth juror": "The trial court is in a far better position than an appellate court to determine whether a damage award was influenced by 'passion or prejudice.' (Code Civ. Proc., § 657.) In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence

and resolve issues of credibility. [Citation.]" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.) We review the trial court's determination for an abuse of discretion. (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 858, disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.)

The United States Supreme Court has also provided three "guideposts" for such review: "(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440.)

In connection with a federal due process challenge, trial andreviewing courts conduct *de novo* review. (*Cooper Industries, Inc. v. Leatherman Tool Group,Inc., supra,* 532 U.S. at p. 440.)

Our Supreme Court, in *Adams v. Murakami, supra,* 54 Cal.3d at page 112, has noted the difficulty in addressing the issue of excessiveness of punitive **[57]** damages: "The determination of whether an award is excessive is admittedly more art than science. 'The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences.' [Citation.]" (*Id.* at p. 112.)

Utilizing the foregoing principles, we review the evidence and the trial court's determination.

(1) *Reprehensibility of Conduct*

The trial court, reviewing the motion for new trial pursuant to California and federal law, concluded that "Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral." We agree.

In California, it has been held that intentionally marketing a defective product knowing that it might cause

injury and death is "highly reprehensible." (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 806.) The court in *Romo* found Ford's conduct justified a punitive damage award of approximately $23 million. Another court, also reviewing the actions of Ford Motor Company in connection with the marketing of a defective product, affirmed an award of $3.5 million in punitive damages with the following language: "[T]he conduct of Ford's management was reprehensible in the extreme. It exhibited a conscious and callous disregard of public safety in order to maximize corporate profits." (*Grimshaw, supra*, 119 Cal.App.3d at p. 819.)

The most recent United States Supreme Court decision on punitive damages, *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, identified several subsidiary factors which guide the determination of the degree of reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the **[59]** conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*Id.* at p. 419.) The court then noted: "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]" (*Ibid.*)

The court also held that "'repeated misconduct is more reprehensible than an individual instance of malfeasance,'" "'a recidivist may be punished more severely than a first offender,'" so long as "the conduct in question

replicates the prior transgressions." (*State Farm, supra,* 538 U.S. at p. 423.) Also, evidence of great profit may be relevant to show greater degree of reprehensibility. (*Id.* at p. 423.)

It also concluded that due process prohibits the imposition of punitive damages for unrelated unlawful acts committed outside of the state's jurisdiction, or acts that were lawful in the jurisdiction where they occurred. It explained: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." (*State Farm, supra,* 538 U.S. at p. 423.) *But, similar out-of-state conduct may be relevant to the issue of reprehensibility when it demonstrates the deliberateness and culpability of the acts committed in the state where they are tortious, so long as the conduct has a "nexus to the specific harm suffered by the plaintiff."* (*Id.* at p. 422, 123 S.Ct. 1513, italics added.) **[60]**

Utilizing the five factors listed in *State Farm*, all show a high degree of reprehensibility and weigh in favor of the jury's conclusion that a substantial punitive damage award was appropriate in this case. The evidence supports the conclusion that Boeken's injuries were caused by Philip Morris's fraud and defective product, and were physical, not merely economic. Philip Morris's conduct was repeated over a period of almost 50 years with an indifference to the health or safety of Boeken and others, and Boeken was physically and psychologically vulnerable, and eventually, economically vulnerable.

Philip Morris manufactured a dangerous product, knowing that it was a dangerous product — one that caused addiction and disease, and it added chemicals to the product to make it more addictive and easier to draw into the lungs, thus making it more dangerous. At a young age, Boeken was drawn to the product and to the Marlboro brand with misleading advertising specifically

targeted to male adolescents. He was kept smoking with misleading statements and falsehoods about smoking, disease, and addiction, the believability of which was enhanced by addiction; and Boeken's addiction was ensured by increasing Marlboro's nicotine delivery.

Philip Morris contends that its fraud cannot be deemed reprehensible, because the health risks of smoking were public knowledge for decades; because the State of California protected cigarette companies from liability for the ten-year period of former Civil Code section 1714.45; and because its tortious conduct was "remote," as shown by the trial court's instruction to the jury limiting liability for Philip Morris's fraudulent concealment to conduct that occurred prior to 1969.

We cannot agree with Philip Morris's suggestion that section 1714.45 makes its conduct less reprehensible, on the ground that it provided immunity from liability for fraud and dangerous product under the facts of this case. Philip Morris added urea to make Marlboros more addictive, and flavorings to make it easier for **[61]** the smoke to reach the lungs. Section 1714.45, as we have discussed, provided immunity only for *unadulterated* tobacco products. (See *Naegele, supra*, 28 Cal.4th at pp. 864-865; *Myers, supra*, 28 Cal.4th at p. 837.)

The health risks of smoking may have been public knowledge for decades, but given the evidence of the false controversy created by Philip Morris, the adulterations added to the cigarettes, the nature of addiction, the fact that Boeken failed to understand and appreciate the risks of smoking, and Philip Morris's marketing of so-called light cigarettes, knowing that they are more dangerous than ordinary consumers expect, this argument fails.

In addition to fraud, the evidence establishes that Philip Morris acted with a conscious disregard of consumer health and safety in the manufacture and marketing of a dangerous product, and intentionally took advantage of the consumer expectation that "light" cigarettes were safer.

Philip Morris knew that there was no reason to believe Marlboro Lights or Ultralights were any safer than its Reds. Compensation has been described in scientific literature for 40 years, and Philip Morris's own research found no reduction in tar delivery for Marlboro Lights over regular cigarettes, but Philip Morris has only just recently initiated a study of human smokers to measure how much tar they actually take in. And although Philip Morris's laboratories were "state of the art," its studies of biological activity, using actual cigarettes that it markets, did not begin until 1999 or 2000.

Further demonstrating a conscious disregard for consumer safety, Philip Morris was *still* marketing "light" cigarettes at the time of trial, knowing that they may increase the risk of more serious cancers. And Philip Morris was still adding urea to Marlboro tobacco, causing more nicotine to be delivered more quickly to the smoker, as well as flavorings to create bronchodilators to open up the lungs. **[62]**

The Marlboro Lights or Ultralights smoked by Boeken resulted in adenocarcinoma of the lung, which spread to his brain and spine. Since 1959, it has been known that smoking is the cause in more than 90 percent of the cases of this aggressive form of lung cancer. But Philip Morris tested carcinogenicity in secret, in a lab out of the country. There, a less carcinogenic Marlboro cigarette was developed in 1979, using reconstituted tobacco, but it was never marketed, and senior Philip Morris's scientist, Dr. Osdene, received all reports from the secret lab at his home and destroyed them after reading them.

At the time of trial, about 16 million people in the United States smoked Marlboros. Among teenagers, Marlboro is the brand of choice. Marlboro cigarettes are the best selling brand in the country, and the Golds, so-called light Marlboros, outsell the regular Reds. Experts believe that the increase in lung adenocarcinoma, a more aggressive and fast-spreading cancer, is attributable to low-tar cigarettes, which most smokers believe to be less hazardous. Nevertheless, Philip Morris continued

to market light Marlboros.

A smoker's risk of death from all smoking-related causes is 18 to 36 percent, and the longer one smokes, the greater the risk. In 1993, a report of the Environmental Protection Agency concluded that second-hand smoke kills 3000 non-smoking Americans annually. Dr. Carchmann admitted that of the people who die every year in this country from smoking-related disease, 200,000 are attributable to Philip Morris products.

Philip Morris contends that harm to others cannot be considered in a punitive damage analysis. But as we have previously explained, similar out-of-state conduct may be relevant to the issue of reprehensibility when it demonstrates the deliberateness and culpability of the acts committed in the state where they are **[63]** tortious, so long as the conduct has a "nexus to the specific harm suffered by the plaintiff." (*State Farm, supra*, 538 U.S. at p. 422.)[27]

Philip Morris contends that its conduct in other states consisted solely of lawfully selling cigarettes, and that it was not shown to be similar to that which injured Boeken, because there was no evidence that it caused any injury to *specific* persons in other states. We find nothing in *State*

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[27] In a related argument raised for the first time in its reply brief, Philip Morris argues that the trial court should have instructed the jury using language similar to that from State Farm "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." Philip Morris forfeited this issue by failing to request such an instruction from the trial court. State Farm was not the first case enunciating this concept. It was first addressed in *BMW*, where the Court stated that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 572, (*BMW*).) Thus, *BMW* provided sufficient authority to enable Philip Morris to draft and request an appropriate instruction. The trial court was not required to draft it for Philip Morris. (See *Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701.) And a party may not complain on appeal of a failure to give an instruction it did not request. (*Linzsey v. Delgado* (1966) 246 Cal.App.2d 504, 509.)

Farm that requires proof of injury to specific persons other than the plaintiff, wherever they reside, when the conduct in question is identical, as it was here, since the conduct that injured Boeken was not confined to California. "'[R]epeated misconduct is more reprehensible than an individual instance of malfeasance,'" "'a recidivist may be punished more severely than a first offender,'" so long as "the conduct in question replicates the prior transgressions." (*State Farm, supra*, 538 U.S. at p. 423, quoting *BMW, supra*, 517 U.S. at p. 577.)

The very conduct that injured Boeken was directed at all smokers in the United States, repeated over many years with knowledge of the risk to human life and health, and is probative of intentional deceit. The national marketing of a defective product, knowing that ordinary consumers expect it to be less hazardous, **[64]** knowing that thousands of people will die due to their addiction, is probative of a willful and conscious disregard of the danger to human life. (See *State Farm, supra*, 538 U.S. at pp. 423-424.) We find that a sufficient nexus has been shown here with Philip Morris's conduct in the other states, whether lawful or unlawful, to consider the evidence on the issue of reprehensibility. (See *id.* at p. 422.)

Having concluded that Philip Morris's conduct is "extremely reprehensible," as in *Romo v. Ford Motor Co.*, and that there is sufficient evidence supporting all five reprehensibility factors under *State Farm*, a substantial punitive damage award was justified. We turn to the second element under each test: the ratio of compensatory damages to punitive damages.

(2) *Ratio of Compensatory to Punitive Damages*

Here, the original punitive damage award of $3 billion is approximately 540 times the compensatory damage award of $5.5 million. The trial court concluded that such a ratio was not "unprecedented," citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, but

it noted, as argued by Philip Morris, that most cases addressing punitive damages in the context of an award of compensatory damages exceeding $1 million have found ratios of 4 to 1 and 3 to 1 more appropriate.

Under California law an award is presumed to be the result of passion and prejudice where it is grossly disproportionate to compensatory damages. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928; *Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 750.) "[I]n general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small." (*Neal, supra*, 21 Cal.3d at p. 928.) A disparity of 63:1 has been presumed to have resulted from passion and prejudice, even where the defendant was a wealthy national corporation and the **[65]** award represented an acceptable "one fourth of one percent of [the defendant's] net assets, and only three and one-half days of its net income." (*Rosener v. Sears, Roebuck & Co., supra*, 110 Cal.App.3d at p. 750.)

In *State Farm*, the United States Supreme Court observed that in *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1 at pages 23-24, it had "concluded that an award of more than four times the amount of compensatory damages *might* be close to the line of constitutional impropriety. [Citation.]" (*State Farm, supra*, 538 U.S. at p. 425, italics added.) And the Court was of the opinion that it should be "obvious" that "[s]ingle digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution, than awards with ratios in range of 500 to 1, [citation]." (*Ibid.*)

It appears the Supreme Court in State Farm meant for ratios to be *instructive*, not *binding*. It refused, as it has in the past, "to impose a bright-line ratio which a punitive damages award cannot exceed," observing that it had "'consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the

punitive award' [citation]." It stated that "there are no rigid benchmarks that a punitive damages award may not surpass." (*Id.* at pp. 424-425.)

The Supreme Court suggested examples of circumstances that might justify ratios greater than previously upheld, such as "where 'a particularly egregious act has resulted in only a small amount of economic damages,'" or "where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" (*State Farm, supra,* 538 U.S. at p. 425, citations omitted.) But it acknowledged that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Id.* at p. 425.) **[66]**

The Court also stated that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*State Farm, supra,* 538 U.S. at p. 425, 123 S.Ct. 1513.) The Court's holding was expressly based on the fact that, in that case, "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." (*Id.* at p. 426.)

Boeken contends that the reasoning of *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672, justifies a larger ratio, because there, the defendant's very reprehensible conduct caused bed bug bites, not grave physical injury or death, and a 37:1 ratio was upheld. A higher ratio was justified in that case, however, not solely because of reprehensibility, but also because the great wealth of the defendant, compared to the small compensatory award, might otherwise permit the wealthy defendant to make it economically infeasible to bring the action. (*Id.* at pp. 676-677.)

Relying upon the Supreme Court's suggestion in State Farm that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," (*State Farm, supra,* 538 U.S. at p. 425; see

BMW, supra, 517 U.S. at p. 582), Philip Morris contends that the compensatory award of $5,539,127 was so substantial as to justify only a 1:1 ratio. A similar argument was made to the trial court which stated: "In the end, this argument leads to the unsupportable proposition that those who commit the most devastating and reprehensible wrongs are given caps on their punitive damages exposure which those who commit lesser wrongs do not receive--a proposition standing the legitimate and necessary role of punitive damages on its head." **[67]**

(3) *The Wealth of Philip Morris*

The third prong of the test in California is the wealth of the defendant: "[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Neal, supra*, 21 Cal.3d at p. 928.)

Both California and the federal authorities agree that profits earned from tortious activity which supports an award of punitive damages are appropriately considered in the amount awarded. (*Haslip, supra*, 499 U.S. at p. 22; *Neal, supra*, 148 Cal.3d at pp. 928-929.)

State Farm did not disavow the use of wealth in assessing punitive damages. The principle of federalism remains in play: "[E]ach State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." (*State Farm, supra*, 538 U.S. at p. 422.) What *State Farm* does say is: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*Id.* at p. 427.) And *State Farm* recognizes that deterrence is one of the primary purposes of punitive damages. (*Id.* at p. 416.)

California courts have routinely upheld punitive damage awards which amounted to a percentage of net worth from .005 percent (*Grimshaw, supra*, 119 Cal.App. 3d at p. 820), to 5 percent (*Weeks v. Baker & McKenzie*

(1998) 63 Cal.App.4th 1128, 1166), and not exceeding 10 percent. (*Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515.)

Here, the trial court made the following findings regarding wealth:

> "Philip Morris offered no evidence of its financial condition and rested entirely on the state of plaintiff's evidence. Plaintiff's expert economist, Robert Johnson, testified essentially unrebutted, **[68]** that Philip Morris's domestic tobacco company has a value of between $30 and $35 billion. The worth of the company's domestic operation is not reported separately in the parent company's annual report and must be broken out using estimations involving income and revenue. California law permits using defendant's wealth, income, or both to estimate financial condition. *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal. App.3d 451; *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal.App.3d 266. A strict accountant's 'assets vs. liabilities' calculation is not required, and Philip Morris offered no expert testimony at trial rebutting the validity of the methodology used by Mr. Johnson.
>
> "While Robert Johnson offered evidence indicating a potential value exceeding $35 billion, ample evidence, uncontradicted by credible contra evidence, exists on the record to support a finding that defendant's current worth at the time of trial was between $30 and $35 billion. Exercising its independent judgment, the Court finds this fact true for the purposes of assessing the reasonableness of the jury's punitive damages award.
>
> "Plaintiff suggests, and the Court agrees, that California cases tend to limit punitive damages awards to sums generally in a range under 10% of a defendant's total worth. [Citation.] As with

> punitive-to-compensatory ratios, this figure is not a matter of mathematical certainty or invariant. [Citations.] The jury's award here is within the percentage of worth guideline generally allowed by California law." **[69]**

Given the discretion vested in the trial court, we must give great deference to the trial court's findings in this regard. (*Mosesian v. Pennwalt Corp., supra*, 191 Cal.App. 3d at p. 858, 236 Cal.Rptr. 778.) That being so, the trial court is correct that the award of $3 billion in punitive damages falls within the guidelines of California law, being just 10 percent or less of net worth.

But an inference arises that the jury acted out of passion and prejudice if the award exceeds the amount needed to accomplish the goal of punishment and deterrence. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1259.)

(4) *The Difference Between Punitive Damages and Civil Penalties*

The third guideline under federal law is the "difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575.)

The trial court found little help in this guideline. "Finding analogous penalty provisions sanctioning frauds leading to wrongful death is a difficult, if not impossible, undertaking. Plaintiff points to the California Unfair Competition Act proscribing 'any unlawful, unfair or fraudulent business act or practice . . . .' Cal. Bus. & Prof.Code § 17200. Using the potential multiples achievable for discrete antitrust violations prescribed by the California Unfair Trade Practices Act, a different law, plaintiff attempts an analogy assuming the sale of each pack of cigarettes as a single violation, leading to staggering potential fines at $1000 per sale. Plaintiff also cites

Penal Code provisions purporting to permit fines of $10,000 for each violation, and separate provisions allowing co[illegible] to fine employees individually for their misconduct. Philip Morris offers no analogies other than to criticize those proposed by plaintiff. [¶] The Court has not on its [**70**] own found any convincing analogous civil or criminal penalties that could be imposed for comparable misconduct, and considers this factor relatively neutral in assessing the reasonableness of the jury's punitive damages award here."

The Supreme Court has referred to "a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." (*State Farm, supra*, 538 U.S. at p. 425; citing *BMW, supra*, 517 U.S. at p. 581, and fn. 33.)

The California Legislature has declared that "keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the *highest priorities* in disease prevention for the State of California." (Health & Saf.Code, §§ 118950, subd. (a)(11), 104350, subd. (a)(9), italics added.) To this end, California imposes civil penalties on persons who furnish cigarettes to minors. (Bus. & Prof.Code, § 22958.) It is also a crime, and carries a possible fine of $1,000 after the third offense. (Pen.Code, § 308, subd. (a).)

California also imposes civil fines for "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof.Code, § 17200.) Although the record contains no evidence of typical fines for unlawful or unfair business practices, we may consider not only civil penalties that are actually imposed, but those that are authorized in comparable cases. (*State Farm, supra*, 538 U.S. at p. 418.) A $2,500 civil penalty may be assessed for each violation. (Bus. & Prof.Code, § 17206, subd. (a).) Boeken smoked two and one-half packs of Marlboros per day for 43 years, approximately 40,000 packs, as a result of Philip Morris's continuing fraud. If the sale of each pack to Boeken were considered a violation, fines authorized by statute could

amount to nearly twice the $100 million in reduced punitive damages confirmed by the trial court in this case. **[71]**

We agree with the conclusion of the trial court. This is basically a case of wrongful death resulting from fraudulently marketing a defective product. No analogous civil or criminal penalties have been identified against which to measure the award of punitive damages.

(5) *Application of the Law to the Facts*

"[T]he more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (*Neal, supra*, 21 Cal.3d at p. 928.) The trial court's decision is succinct: "After balancing all the relevant considerations, the Court finds that the jury's punitive damage award was legally excessive because it produced an excessive punitive-to-compensatory ratio. While the Court cannot know with certainty what ratio is exactly correct, it finds that a ratio of approximately 20-to-1 is appropriate in this particular circumstance. No party disputes the rationality of the jury's compensatory award of $5,539,127, and the Court, exercising its independent[] judgment determines from all the evidence that a punitive award of $100 million is a reasonable sum to be awarded against Philip Morris in these circumstances."

We recognize the large discrepancy between the compensatory and punitive damages, and the deference to what the trial court's determination on a motion for new trial is due. Nevertheless we must exercise our own *de novo* review of the amount ordered by the trial court. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, 532 U.S. at p. 440.)

We have found Philip Morris's 40 years of fraud and its *continuing* conscious disregard for the safety and lives of the consumers of its so-called low-tar Marlboros to be "exceptionally extreme." On the other hand, the compensatory damage award was significant. The ultimate question is how much is necessary to deter and punish

the activity, a conundrum recognized by our Supreme Court in **[72]** *Adams v. Murakami, supra*, 54 Cal.3d at page 110: "The nature of the inquiry is a comparative one. Deciding in the abstract whether an award is 'excessive' is like deciding whether it is 'bigger,' without asking 'Bigger than what?'" (*Id.* at p. 110.)

The trial court reached its conclusion before *State Farm* had been decided. Although *State Farm* reiterated many principles which had been laid down before the trial court ruled, its discussion regarding ratios shed new light on application of the principles.

Recognizing that history, and applying *State Farm's* principles, one California court applied a ratio of nearly 4:1, which was, in its opinion, the outer constitutional limit for an *unexceptional* fraud case that caused only economic damages that were "neither exceptionally high nor low," and in which the fraudulent conduct was "neither exceptionally extreme nor trivial." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057.) Another California court concluded "that an award at the high end of the single-digit ratio spectrum is justified." (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26.) It allowed a ratio of 9 to 1, but the wrongdoing caused no physical injury or death and the "amount of damages suffered by plaintiffs was relatively small in comparison to the seriousness of the defendants' conduct." (*Id.* at p. 23.)

A multiplier of .05 percent of Philip Morris's net worth of $30-35 billion, as approved in *Grimshaw* for very reprehensible conduct over just three model years of the Ford Motor Company's Pinto automobile, would result in an award of $17.5 million. (See *Grimshaw, supra*, 119 Cal.App.3d at pp. 775, 792, 820.) Forty years of fraud and the ongoing (at least at the time of trial) marketing of a deadly and addictive product more dangerous than ordinary consumers expect, merits a greater multiplier. **[73]**

Evidence indicated that Philip Morris earns a profit of nearly $15 million per day, and a week's profit, as approved in *Neal, supra*, 21 Cal.3d at page 929, would therefore be nearly $103 million, very close to the reduced award in this case. Such a figure can be reconciled with the wealth that Philip Morris derives from California. A multiplier of 5 to 10 percent of net worth may be necessary to deter a very wealthy wrongdoer. (See *Weeks v. Baker & McKenzie, supra*, 63 Cal.App.4th at p. 1166, 74 Cal.Rptr.2d 510; *Storage Services v. Oosterbaan, supra*, 214 Cal.App.3d at p. 515.) Although Philip Morris's profits in California are unknown, evidence suggests that 18 percent of the residents of this very populous state are smokers; Philip Morris enjoys a very large market share; and $100 million is less than 7 percent of a 1/50th share of Philip Morris's net worth.

Philip Morris contends that since other California juries have returned verdicts including substantial punitive damages for the same conduct, there is less need to further the state's interest in deterrence by approving a greater award. We agree that punitive damages previously imposed against it for the same conduct in other cases, as well as possible future awards, are relevant in determining the amount of punitive damages required to sufficiently punish and deter, so long as they are shown to have identical issues. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661.)

In support of this point, Philip Morris refers to two judgments taken against it on similar facts. One, *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, has been reversed by the court of appeal. In the other, *Henley v. Philip Morris, Inc.*, No. A086991 (previously published at 114 Cal.App.4th 1429), the Court of Appeal reversed the punitive damage award to $9 million, conditioned upon the plaintiff's acceptance. But the appellate court in that case was bound by a net worth finding of just $3.4 billion. Here, the trial court concluded the net worth was in the range of $30 to $35 billion. **[74]**

Philip Morris contends that the state's interest in deterring future wrongs is satisfied by the 1998 Master Settlement Agreement (MSA), asserting that the MSA requires it to pay $20.5 billion to the State of California over a number of years, beginning in 2000 and ending in 2025, and that such sum is designed to deter Philip Morris from engaging in the same conduct upon which the punitive damage award is based in this case.[28]

In particular, Philip Morris points out, the MSA prohibits youth targeting, bans virtually all outdoor and transit advertising, prohibits any agreement to limit or suppress research on the health effects of smoking, and requires the dissolution of the Tobacco Institute and the Council for Tobacco Research.

The purpose of the lawsuits underlying the MSA was to recover the states' costs of providing health care to persons with smoking-related illnesses. (*A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.* (2001 3d Cir.) 263 F.3d 239, 241.) The billions of dollars to be paid over the years by the signatory tobacco companies are intended to pay such claims, and to fund measures aimed at reducing underage smoking. (Health & Saf.Code, §§ 104555-104557; see *PTI, Inc. v. Philip Morris Inc.* (C.D.Cal. 2000) 100 F.Supp.2d 1179, 1185.) We note that Philip Morris has referred to no evidence in the record or judicially noticed to support its claim that its share of the payments under the MSA will amount to $20.5 billion in the period ending 2025. For proof of this assertion, Philip Morris refers only to argument in its memorandum of points and authorities in support of its motion for new trial. This is not evidence. (See *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090.) **[75]**

The MSA requires payments from all tobacco companies participating in the settlement, according to their relative market shares. "Market share" is defined by the

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[28] See the MSA online at http:// caag.state.ca.us/tobacco/pdf/1msa.pdf.

MSA as a percentage of the total number of cigarettes sold in the 50 United States. "Relative market share" refers to a percentage of the total number of cigarettes shipped in or to the 50 states. Since 1998, Philip Morris has sold fewer cigarettes, which may have reduced its market share. But since there is no evidence in the record of the number of cigarettes sold or shipped by Philip Morris and the other participating tobacco companies, we cannot determine its market share or relative market share, and Philip Morris's figure of $20.5 billion remains just argument.[39]

And Philip Morris has not shown from the provisions of the MSA that its purpose is punitive, rather than compensatory, relying instead upon the comments of a Florida court to that effect. (See e.g., *Liggett Group Inc. v. Engle* (Fla.App. 3 Dist.2003) 853 So.2d 434, 469, review granted May 12, 2004.) Our review of the MSA reveals no provision prohibiting the participating tobacco companies from raising prices to pay the sums called for in the agreement. Since 1998, although Philip Morris has sold fewer cigarettes, it has increased its prices, with the result that revenues were up 47.99 percent in 2000. Philip Morris may simply absorb the cost by raising prices without any competitive disadvantage, because the other participants are likely to do the same, and if so, there may be no punitive or deterrent effect as a result of the payments required under the MSA. (See *Grimshaw, supra*, 119 Cal.App.3d at p. 820; cf., *Neal, supra*, 21 Cal.3d at p. 929, fn. 14.)

We agree, however, that the MSA does provide Philip Morris with an incentive not to misrepresent the health risks of its products, and not to target **[76]** underage smokers with its misrepresentations, since it prohibits it from doing so. On the other hand, it does not deter Philip Morris from adding flavorings and chemicals that make

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[39] The MSA provides for calculation of shares by an independent auditor.

its product more addictive and easier to take into the lungs. It does nothing to deter Philip Morris from marketing *defective "light" cigarettes, knowing that they are more* dangerous than the ordinary consumer expects.

Given these other incentives and the final punitive damage award in *Henley*, we conclude that more than a single digit multiplier is not justified. But the extreme reprehensibility of increasing addictiveness by manipulating additives, gaining smokers by fraud, and marketing a product that is more dangerous than ordinary consumers expect, knowing that serious physical injury and death will result in many smokers, does justify a ratio of at least 9 to 1. We round off the figure at $50 million.

DISPOSITION

The judgment is affirmed in all respects except the amount of punitive damages. The judgment is modified to reduce the punitive damage award to $50 million, provided Boeken files a timely consent to such reduction in accordance with rule 24(d), California Rules of Court. If no such consent is filed within the time allowed, the judgment is reversed with regard to the amount of punitive damages only, and remanded for a new trial solely upon that issue. Each side is to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

APPENDIX C

Filed 9/21/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

JUDY BOEKEN, as Trustee, etc.,	)	
Plaintiff and Respondent,	)	
v.	)	B152959
	)	(Los Angeles County
PHILIP MORRIS INCORPORATED,	)	Super. Ct. No. BC226593)
Defendant and Appellant.	)	

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Jr., Judge. Affirmed as Modified conditioned upon acceptance of Remittitur.

Arnold & Porter, Murray R. Garnick, Robert A. McCarter, Washington, DC, Ronald C. Redcay and Maurice A. Leiter for Defendant and Appellant.

Michael J. Piuze for Plaintiff and Respondent. **[2]**

BACKGROUND

Richard Boeken commenced this action on March 16, 2000, by filing a ten-count complaint for personal injuries caused by his cigarette addiction.[1] The complaint alleges that Boeken began smoking in 1957, when he was a minor, that he smoked Marlboro and Marlboro Lights, both manufactured by Philip Morris USA, Inc., and that he was diagnosed with lung cancer in 1999.

The cause was tried to a jury under theories of negligence, strict product liability, and fraud, over approximately nine weeks, beginning in March 2001. The jury found that prior to 1969, Philip Morris's product was defective either in design or by failure to warn, and that it caused Boeken's injuries. The jury also found that Boeken was injured as a result of Philip Morris's fraud by intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation; and that he justifiably relied on Philip Morris's fraudulent utterances and concealment. The jury awarded $5,539,127 in compensatory damages, and assessed punitive damages in the sum of $3 billion dollars.

Philip Morris's motion for judgment notwithstanding the verdict was denied. On August 9, 2001, Philip Morris's motion for new trial was granted solely upon the issue of punitive damages, and conditionally denied, subject to Boeken's acceptance of a reduction in punitive damages to the sum of $100 million. Boeken consented to the reduction, and an amended judgment was entered on September 5, 2001. Philip Morris and Boeken then filed timely notices of appeal. **[3]**

Philip Morris assigns seven categories of error upon which it contends that it is entitled to a reversal. First,

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[1] Since Philip Morris and Boeken have both appealed, we shall refer to them by name. Richard Boeken has died, but we shall continue to refer to respondent and cross-appellant as Boeken, since his successor in interest is his widow of the same name, Judy Boeken, trustee for the Richard and Judy Boeken Revocable Trust.

Philip Morris contends that Boeken's fraud causes of action remained unproven, because there was insufficient evidence that Boeken heard or relied on any particular false statement or that any reliance was justifiable, and because Philip Morris had no duty to disclose any information found to have been fraudulently concealed.

Second, Philip Morris contends that Boeken failed to prove the elements of product liability, whether measured under the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.

Third, Philip Morris contends that the trial court erred in refusing to allow it to impeach Boeken with evidence of his 1992 felony conviction.

Fourth, Philip Morris contends that some of Boeken's claims were preempted by federal law regulating cigarette advertising, that the trial court should have excluded evidence and argument related to youth-targeted advertising, and that the trial court should have instructed the jury not to consider such evidence.

Fifth, Philip Morris contends that the trial court abused its discretion by removing a juror during deliberations.

Sixth, Philip Morris contends that Civil Code section 1714.45 bars all or part of Boeken's claims.

Philip Morris's final contention is that the punitive damage award was excessive pursuant to federal and state constitutional law. Boeken's appeal requests that we reinstate the jury's punitive damage award.

Except for the final contention, we reject all of Philip Morris's claims. We agree that the award for punitive damages, even after reduction by the trial court, is **[4]** excessive and we affirm the grant of a new trial unless Boeken accepts a further remittitur to the amount of $50 million.

We shall discuss each contention, but not strictly in the same order it is asserted in the briefs, since some issues are interrelated and thus more easily discussed together.

DISCUSSION

1. *Philip Morris Has Forfeited its Claim that Substantial Evidence Does Not Support the Fraud Verdicts*

Philip Morris contends that there was insufficient evidence of Boeken's reliance on any false statements or nondisclosures to support a finding of fraud. In particular, relying upon *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082 (*Mirkin*), Philip Morris contends that the evidence was insufficient to prove that Boeken was aware of *specific* misrepresentations and acted upon those specific misrepresentations.[2] Philip Morris also contends that the evidence was insufficient to establish a duty to disclose the concealed information.

The jury found against Philip Morris on the fraud claims of intentional misrepresentation, concealment, false promise, and negligent misrepresentation. Philip Morris challenges only the evidence of its duty to disclose and of Boeken's reliance, not the evidence establishing that it made misrepresentations, made misleading statements and concealed the facts that would have clarified them, or **[5]** that it made a false promise, all with an intent to defraud. Indeed, Philip Morris does not challenge or even summarize most of the large volume of evidence showing that it was aware of the health hazards and addictive nature of its tobacco products, or that it undertook a campaign to disseminate falsehoods about smoking and health, and to conceal the truth from the public, including Marlboro smokers such as Boeken, in order to mislead them into believing that their cigarettes

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[2] In *Mirkin*, the Supreme Court reaffirmed the California rule that a fraud cause of action requires proof of actual reliance, and rejected a fraud-on-the-market theory of reliance advocated by plaintiffs who could not plead or prove that they heard or read any of the alleged misrepresentations, whether directly or indirectly. (*Mirkin, supra*, 5 Cal.4th at pp. 1088-1092.)

were safe and not addictive.

"When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The judgment is presumed to be correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) And we presume that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) It is the appellant's burden to demonstrate that it does not. (*Ibid.*)

In furtherance of its burden, the appellant has the duty to fairly summarize the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) This means that the trial evidence must be summarized in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolving any conflicts in support of the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Further, the burden to provide a fair summary of the evidence "grows with the complexity of the record. [Citation.]" (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) The record in this case is very complex.**[6]** The testimony heard bythe jury spans 25 of the 40 volumes of reporter's transcripts. There are also 75 volumes of clerk's transcripts in the record. Boeken has provided copies of approximately 40 exhibits admitted at trial, but it appears that there were hundreds more shown to the jury that have not been transmitted to this court.

In addition, portions of Boeken's videotaped deposition were played for the jury, and the parties have lodged a redacted transcript of the deposition, containing what appears to be 300 pages. Videotaped interviews of two other witnesses were lodged at our request, and were not transcribed.

Nevertheless, Philip Morris has provided only the briefest summary of the trial evidence, and has summarized only those facts which support its theories. Almost all of Philip Morris's factual summary consists of evidence favorable to its position — evidence showing that the dangers of smoking were well known by the public in the 1950s and 1960s; and other evidence from which a jury could reasonably infer that Boeken understood the health risks of smoking.

Even if Philip Morris were to show that the inferences it wishes us to draw are reasonable, we would have no power to reject the contrary inferences drawn by the jury, if they are reasonable as well. (*Crawford v. Southern Pacific Co., supra*, 3 Cal.2d at p. 429.) And a recitation solely of Philip Morris's own evidence is not a fair summary for purposes of determining whether any inferences drawn by the jury are reasonable and supported by substantial evidence. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

Philip Morris's failure to provide a fair and complete summary of the evidence supporting the judgment results in forfeiture of contentions based upon the sufficiency of the evidence. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.) We must assume that the missing evidence, including the **[7]** evidence supplied by missing exhibits, was sufficient to support the jury's findings. (*Supreme Grand Lodge etc. v. Smith* (1936) 7 Cal.2d 510, 513.)

In lieu of tendering the proper summary, Philip Morris suggests that Boeken's counsel, Mr. Piuze, conceded the absence of evidence of reliance and causation during argument on post-trial motions when he answered, "No," to the following question by the court: "The question is, can the plaintiff point to a single statement made by Philip Morris that ultimately reached Mr. Boeken that can be traced backward through a definite causal link back to Philip Morris?" But the discussion of the matter did not end with that negative response. Piuze went on to explain to the court that the issue of reliance had been proven by

circumstantial evidence.

"The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814.) Reliance "'may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of [reliance] than . . . direct testimony to the same effect.' [Citations.]" (Id. at p. 814.)

We conclude that there was no concession, and in order to preserve the issue for appeal, Philip Morris was required to provide a fair summary of the evidence supporting the verdict, whether direct or circumstantial, and it did not do so. In any event, our review has revealed sufficient evidence to support the judgment, as we discuss in the next section.

2. *Substantial Evidence Supports Actual Reliance and Duty Findings*

Philip Morris contends that the evidence was insufficient to establish a duty to disclose information that it fraudulently concealed. At the same time, however, Philip Morris concedes that a duty to speak may arise when necessary to clarify **[8]** misleading "half-truths." (See *Randi W. v. Muroc Joint Unified Sch[illegible] Dist.* (1997) 14 Cal.4th 1066, 1082-1083.) But, Philip Morris contends, no duty arises were the plaintiff has not been misled by the half-truths.

Philip Morris confuses the elements of duty and reliance. The duty arises upon the utterances of the half-truths; whether the plaintiff was misled is a question of reliance. (Cf., *Randi W. v. Muroc Joint Unified School Dist.*, *supra*, at p. 1084.) Since Philip Morris does not challenge the evidence of its half-truths, we turn to its contentions with regard to reliance.

Relying on *Mirkin*, *supra*, 5 Cal.4th 1082, Philip Morris suggests that in order to show reliance, Boeken was required to prove that the false or misleading representa-

tions were made directly to him and that such proof must include the exact words of the false or misleading representation upon which he relied. We find no such requirements in *Mirkin*.

As stated in *Mirkin*, Restatement Second of Torts section 533 provides: "The maker of a fraudulent misrepresentation is subject to liability . . . to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved." (*Mirkin, supra*, 5 Cal.4th at p. 1095.)

The record supports the conclusion of the jury that Boeken was a target of Philip Morris's misrepresentations and that he actually relied upon them. But a meaningful review of the evidence is impossible without a summary of the misrepresentations, misleading half-truths, concealments and false promises presented to the jury. For a better understanding of the issues, we shall start at the beginning of Boeken's case, although some of the facts recited may not be directly relevant to the issue of reliance. **[9]**

Physicians had the ability in the mid-nineteenth century to diagnose lung cancer. It was a rare disease until some years after the first commercial pre-rolled cigarettes were introduced in the United States in 1913. In the 1930's, there was a sharp increase in the number of cases diagnosed, and by the end of World War II, its incidence had increased 20-fold.

Boeken's epidemiological expert, Dr. Richard Doll, joined Professor Bradford Hill at the London School of Hygiene in the late 1940's, to conduct the first studies in the United Kingdom to determine the cause of lung cancer, and why its incidence had increased so dramatically. Statistics established the causal connection between smoking and cancer, and Doll and Hill published their

results in 1950 in the British Medical Journal.[3]

A Dutch scientist had published a paper in 1948, having reached the same results, and in 1950, a smaller American study was published in the Journal of the American Medical Association by American scientists, Drs. Graham and Wynder, also reaching the same conclusion. There had been earlier studies in Germany, but they were not given much weight because the scientific methods used were not optimal. Around 1953, Wynder applied tobacco tars to the skin of mice for several months, and produced skin cancer.

The popular media and the UK Department of Health were not convinced by the Hill and Doll study, and so the two undertook a years-long study of 40,000 smoking and non-smoking English doctors who did not have lung cancer. They thought it would take 5 years, but in 1954, after two years and 35 deaths due to lung cancer, they felt the result was clear and published it immediately in the **[10]** British Medical Journal. It was more widely accepted and changed attitudes considerably.

The American Cancer Society then undertook a two-year study with 190,000 subjects, in order disprove Doll's conclusions; and in 1954, its scientists concluded that the British study had been correct. Even after the publication of Doll's second study and the American Cancer Society study, some leading scientists still questioned the link between lung cancer and smoking, and opinion among scientists was evenly divided until about 1956. At that time, opinion had firmed up quite definitely among scientists that smoking caused lung cancer.

Neil Benowitz, M.D., Boeken's addiction expert, testified that nicotine is addictive, and the most effective way addiction is achieved is delivery by cigarette smoke.[4]

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[3] Doll has been awarded many honors over the years for his work on tobacco, including knighthood in 1971.

[4] More specifically, Benowitz testified that nicotine is similar to a

Withdrawal symptoms include irritability, anxiety, insomnia, trouble concentrating, nervousness, and dysphoria (mild depression), and can last for months after quitting. Some symptoms last forever. Smokers use denial and rationalization to continue doing what is obviously or apparently harming them and may acknowledge a general risk, but given a choice of conflicting opinions, they will choose the opinion that supports continued tobacco use.

In 1954, the tobacco industry embarked upon a decades-long strategy to create public doubt about the "health charge" through "vigorous" but not actual **[11]** denial, such as by claiming that experimental proof was still lacking, and that the statistics were not to be trusted, because they were poorly obtained or grossly exaggerated.[5]

First, several tobacco companies, including Philip Morris, formed the Tobacco Industry Research Committee (T.I.R.C.), a public relations organization, to counter the "anti-cigarette crusade" by providing "balancing information" regarding "unproven facts."[6] To announce its formation, it published "A Frank Statement" in newspa-

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hormone called acetylcholine (ACH), which is responsible for nerve communication, and is highly concentrated in the brain. ACH binds to receptors which release other hormones that affect mood and behavior. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Nicotine becomes necessary for the brain to function normally. Smoking creates an aerosol, and when the gas goes directly to the lungs, it delivers the nicotine instantly to the heart and brain, achieving its effect within 15 seconds. This immediate reinforcement encourages addiction. Thus, the smoking (of any addictive substance) is the delivery system that causes the fastest addiction.

[5] Philip Morris's knowledge and actions were shown by the testimony of several former employees of the research and development department, which operated several laboratories, and by a series of internal memoranda between company officers assigned to the labs in the 1950s through the 1980's, including Helmut Wakeham, William L. Dunn, T.S. Osdene, and Robert B. Seligman.

[6] At some time in the late 1950s or early 1960s, the Council for Tobacco Research (CTR) replaced the T.I.R.C.

pers across the country. The "Frank Statement" claimed, "Distinguished authorities point out . . . that there is no proof that cigarette smoking is one of the causes [of lung cancer] [and] statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists." [7]

According to Dr. Doll, the Frank Statement was a "bald untruth" and a lie. While some scientists had questioned the link, most knew at the time of the Frank Statement that smoking caused lung cancer. **[12]**

Tobacco studies continued throughout the 1950s in many countries, including Japan, Denmark, and France. In 1957, the United States Heart and Lung Institute, the National Cancer Institute, National Institute of Health, and American Cancer Society appointed a joint committee to advise on the state of the science, and concluded that smoking was a cause of lung cancer. The Auerbach study, published in 1957, showed pictures of various stages to demonstrate how the risk of lung cancer increased after a certain number of years of smoking.

In 1960, the World Health Organization issued a report stating that smoking was a cause of lung cancer, and an editorial in the New England Journal of Medicine stated that no responsible observer could deny the association. Scientists did not yet know what specific substance in cigarette smoke caused lung cancer, but it was proven by 1953 that cigarette smoking caused it by some means, and by 1960, it was indisputable.

Nevertheless, Philip Morris and other tobacco compa-

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[7] The Frank Statement also assured the public that the industry was concerned about the possible health effects of tobacco and was researching the question, and promised that it would inform the public immediately if they found it to be harmful. The promise was false. Philip Morris's own expert, Dr. Carchmann, testified the tobacco industry did not publicly admit that smoking was harmful until approximately 2000.

nies continued their campaign of doubt. T.I.R.C. continued its work, issuing press releases, making personal contacts with journalists, providing "favorable" materials for editorials, articles, and columns, and providing assistance to the authors of such books as *You Don't Have to Give up Smoking* and *Smoke Without Fear.*

A 1957 T.I.R.C. press release quoted its chairman and scientific director as saying, "No substance has been found in tobacco smoke known to cause cancer in human beings nor is any specific mouse carcinogen found." The statement was literally true in that the specific mechanism in cigarettes that caused lung cancer was still unknown, but it was misleading, because the cause and effect had been proven. **[13]**

In the late 1950s, Philip Morris and other tobacco companies formed another trade organization, the Tobacco Institute, to speak on their behalf. The Tobacco Institute issued press releases, such as the 1961 "Tobacco Institute Statement," which asserted, among other things, "The repetition by Dr. Wynder of his firm opinions does not alter the fact that the cause or causes of lung cancer continue to be unknown and are the subject of continuing extensive scientific research by many agencies." And a 1962 press release sent to CBS protesting a program on youth smoking, stated, "causes of lung cancer are still unknown."

The statements were false. In 1961, there were a few other established causes of lung cancer, such as asbestos, but the affected industries were taking precautions to protect people from exposure. Ninety percent of lung cancers were shown to be caused by tobacco, and just ten percent by other causes. By 1961, it was known that most lung cancers were the result of tobacco, and there was no cancer researcher at that time who would say that the cause of lung cancer continued to be unknown.

In 1965, the Tobacco Institute issued a press release based upon the "Genetic Theory" of well-known statistician Ronald Fisher, who opined that there was a genetic factor that caused people to want to smoke and that made

them susceptible to lung cancer. That theory had been repudiated in studies in the 1950s in Sweden, the United States, and Finland. The press release also referred to the "smoking theory" of lung cancer, even though no serious scientific researcher considered it a legitimate scientific concept in 1965. The United States Surgeon General had already reported the link in 1964.

In the 1950s, the major cigarette companies, including Philip Morris, entered into a "gentlemen's agreement" not to market products as tested for safety, not to use test results to compete, such as by claiming that one company's cigarette has **[14]** produced less cancer in rats, and not to do animal testing with regard to cancer. The agreement was in place throughout the 1960s.[8]

In the 1960s, Congress conducted hearings prior to enacting the Public Health Cigarette Smoking Act of 1969. (E.g., 15 U.S.C. §§ 1331, et seq.)[9] In March 1965, the Tobacco Institute issued a press release in which it described, among other things, the testimony of R.J. Reynolds president Bowman Gray before Congress on behalf of cigarette manufacturers, including Philip Morris, in opposition to the proposed legislation. Gray told Congress that many scientists held the opinion that it had not been established that smoking caused lung cancer or any other disease; that there was a very high degree of

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[8] In prior testimony read to the jury, Dr. Jan Uydess established that Philip Morris set up a laboratory in Germany to conduct health-related studies, such as on emphysema and toxicity, and effects on animal systems. Philip Morris did not do the research in the United States, because issues relating smoking to health and addictiveness were considered to be very sensitive. The reports from the German lab were sent to senior Philip Morris scientist T.S. Osdene at his home, and he would destroy them after reading them.

[9] We shall hereinafter refer to this statute either as the Public Health Cigarette Smoking Act of 1969 or simply as the 1969 Act. The 1969 Act required a health warning on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 515-518, 525 (*Cipollone*), discussed within.)

uncertainty; and that a great deal more research was necessary before definitive answers could be given.

By the 1950s, tar was and still is thought to contain most of the organic materials that are likely to cause cancer. When cigarettes were unfiltered and contained large particulate matter, they were irritating, which kept smokers from inhaling deeply. The growing use of filtered cigarettes in the 1960s reduced the amount of delivered tar from about 35 to 25 milligrams, and was thought to reduce the risk somewhat, but filters and flavorings, which act as bronchodilators, made **[15]** cigarettes easier to smoke. The benefits came in the 1950s and 1960s, which saw a reduction from the 35 milligrams in the 1930's, to 25 milligrams. But there has been no benefit from a further lowering of tar beginning in the 1980's to 10 or 15 milligrams. And further reduction of tar in the so-called low-tar or "light" cigarettes has not resulted in a safer cigarette. It has affected only the location of lung cancers and the type of cancer that may be contracted.

It has been generally known since the late 1800's that it is difficult to quit smoking. Scientists have known that nicotine is addictive since the 1920s, although the how and the why came later. At the time of the first Surgeon General's report in 1964, however, many thought that in order to be truly addictive, a substance had to be intoxicating, to have a severe withdrawal syndrome, and to be associated with antisocial behavior, such as criminality. The 1964 Surgeon General's report defined drug addiction as "a state of periodic or chronic intoxication produced by the repeated consumption of a drug." Since tobacco was extremely difficult to quit, but was not intoxicating and did not involve anti-social behavior, the Surgeon General used the term "habituation."

In 1965, the World Health Organization discarded the term "habituation" in favor of "dependence," which encompassed addiction, and the terms *addiction* and *dependence* were generally used interchangeably after that to mean any compulsive drug use. *Dependence* was defined as giving the use of a substance a higher priority

than other things important to the user, like money or health. The intoxication element became obsolete, and *habituation* fell into disuse. By 1988, the Surgeon General's report dropped *addiction*, whether to intoxicating drugs or nicotine, in favor of *dependence*. But the tobacco companies continued urging **[16]** obsolete terminology through misleading statements to the public, according to Benowitz.

Internal memoranda demonstrate that as early as 1959, Philip Morris recognized that "[o]ne of the main reasons people smoke is to experience the physiological effects of nicotine on the human system"; and that Philip Morris researchers knew no later than 1959 that addiction was a probable reason why people smoked. A 1969 memorandum shows that Philip Morris's scientists recognized that nicotine was a drug, but feared regulation by the Food and Drug Administration should this knowledge become public.[10]

Dr. William Farone, who testified for Boeken, was hired in the mid-1970s by Philip Morris for his expertise in colloid chemistry, which relates to aerosols, such as smoke. It was already commonly understood among the Philip Morris scientists at the time he arrived at its laboratory in 1976, that nicotine was addictive. On several occasions, Dr. Osdene described his mission as one to "maintain the controversy," which Farone understood to mean creating doubt whether nicotine was addictive and whether smoking caused disease.

An internal memorandum shows that by 1972, Philip Morris recognized that the more nicotine a cigarette

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[10] Philip Morris attorneys were concerned that research amounting to tacit acknowledgement that nicotine was a drug would be "untimely" because of a legislative effort to transfer authority over tobacco to the FDA. In a 1980 internal memorandum, Robert B. Seligman, Osdene's successor as vice president of research and technology, suggested that Philip Morris continue to study the "drug nicotine" to stay abreast of developments with an active research program, but cautioned, "we must not be visible about it," since the attorneys would "likely continue to insist upon a clandestine effort."

delivered, the greater its market. By then, the Marlboro brand was outselling the popular brands of earlier years.[11] A competitor, **[17]** R.J. Reynolds, conducted a study to determine why, and found that the PH of Marlboro smoke was much higher that the smoke from any of its brands. The higher the PH in cigarette smoke, the more free-base nicotine is delivered to the smoker. Ammonia raises the PH level, and occurs naturally in tobacco, but Philip Morris added urea to Marlboro tobacco, which increases the release of ammonia into the smoke.

In 1977, when Philip Morris scientist Carolyn Levy began to study the effects of nicotine withdrawal, her supervisor, W.L. Dunn, suggested to Osdene that he should "bury" any results, should they show similarities to morphine and caffeine. According to Farone, in 1984 Philip Morris shut down some research programs in order to eliminate research that could show that cigarettes were addictive or that could prove that they cause cancer; senior management no longer wanted to do research that could be used against Philip Morris.

Paul Mele, Boeken's expert in behavior pharmacology with additional training in the area of drug abuse, testified that he was employed by Philip Morris from 1981-1984. Philip Morris employed him to work in its secret laboratory where rat studies were conducted in an attempt to identify a nicotine substitute that would eliminate the adverse cardiovascular effects, but still keep people smoking.

A nicotine substitute would have to bind in the same area of the brain and produce the same effects on brain tissue, but Mele and his coworkers were told never to use the words, "drug" or "addiction."[12] Thus, they euphemistically concluded that rats "will work for" nicotine in the same way that they will work for cocaine or heroin. But

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[11] Marlboro is still the best selling brand in this country.

[12] The term cancer was not to be used either; they referred to it as "biological activity."

the question of addiction or dependence was never in [18] doubt, and their research goal was not to prove or disprove addiction, but to find compounds that would substitute for nicotine, in case nicotine were ever banned.

Dr. Mele wanted to publish a paper on nicotine tolerance during the time he worked for Philip Morris from 1981 to 1984, but his superiors would not permit it. He was told the research demonstrated that nicotine was a "dependence producing substance" within the definition of the Diagnostic and Statistical manual of the American Psychiatric Association, and that it would not be acceptable to the company to have this known by the public. During this period, he heard a Philip Morris officer, Jim Remmington, say, "We all know it is addicting, it's addicting as hell. And our real concern is stopping these anti-smoking people outside the gates."

Thus, Philip Morris knew in the late 1950s, when Richard Boeken started smoking, that cigarettes caused lung cancer. Further, it is reasonable to infer that it also knew by that time, or at least well before 1969, that nicotine was addictive, and that the more nicotine its cigarettes could deliver, the more quickly a smoker would become addicted. By creating a false public controversy, Philip Morris's fraud was directed toward all addicted smokers, providing the doubt or parallel "truth" necessary to rationalize continued smoking.

The evidence also shows that Boeken was addicted to smoking, and Philip Morris's campaign of doubt had its desired effect. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. By the time he was 14 years old in 1957, Boeken was smoking two packs a day,and even more as he got older.

By the time he was 15 or 16, Boeken had begun to suffer his first bouts of bronchitis. The doctor gave him antibiotics, but did not tell him to quit smoking. Although his high-school swim coach told him not to smoke, because it would affect his "wind," meaning endurance, no other teacher told him not to smoke. Most of the teachers smoked, as well. Boeken's mother allowed him

to smoke **[19]** openly at home. She smoked two packs a day herself, and never told him of the dangers of smoking.

Boeken suffered more bouts of bronchitis in his twenties, and by his thirties, he suffered two or three each winter. They were always treated with antibiotics, and no doctor ever told Boeken that they were caused by smoking. Many doctors also smoked at that time. Boeken began to suspect in the mid-seventies that smoking bore some relationship to his bronchitis, but he was unable to stop or even cut down on the number of cigarettes he smoked while he was ill, even when it hurt to inhale.

The Surgeon General warnings went on cigarette packs in the mid-to-late 1960s. Boeken thought that the warnings were "political more than anything else," and that they were required by the government pursuant to some personal vendetta of the Surgeon General. He did not even read the Surgeon General's warning until after he filed this action. Boeken explained, "I believed the cigarette advertisements. . . . I didn't think there was anything wrong. . . . I believed they were good for you. I believed everybody smoked them. You're back in the 60's, right? . . . I didn't believe they were unhealthy."

But Boeken was aware of what he described as a "controversy." He testified that in the 1960s, he heard that the cigarette companies had refuted the fact that cigarettes were addictive, dangerous harmful, or cancer-causing, and he was aware of a "conflict" over the Surgeon General's warnings. And he relied upon the refutations by the tobacco industry. It was only much later that Boeken discovered there was no "real" controversy. He testified that if Philip Morris had made the real risk of lung cancer and death clear to him in the 1960s, when Philip Morris was instead creating a false controversy with regard to the Surgeon General's report, he would have quit smoking. **[20]**

In the 1970s, Boeken heard through various news media that tobacco companies claimed that there was no proof or scientific fact that smoking caused cancer, emphysema, or any other lung or blood disease. He

trusted them, and believed the harm was being overstated by others. Other than advertisements, however, he could not recall particular statements made by tobacco companies until much later, when tobacco executives falsely testified before Congress in 1994.

By the 1970s, he knew that cigarettes were addictive, and that he was addicted, but he believed the statements by the industry that there was no health risk. The first time that Boeken knew that smoking could cause a catastrophic illness was around 1976, when he had his gallbladder removed, and the doctor told him he could get emphysema. He consulted another doctor, who said, "Forget it. You don't have emphysema. He was playing with you."

Boeken tried to stop smoking several times over the years. The first time was in 1967, when his girlfriend gave him an ultimatum. He did not want to lose her, so he stopped; but three or four weeks later, he started again, and she left him.

Boeken tried to quit again in 1976, at the beginning of what he termed, "the health craze," when jogging became popular. He wanted to jog too, and he started lifting weights, but he felt he needed stronger "wind." He was unable to stop smoking, however, due to withdrawal and cravings. His withdrawal symptoms consisted of a bad attitude, nastiness, anger, and a huge appetite. He became edgy and snappy, with inappropriate angry reactions.

In 1980, Boeken tried hypnosis to quit. He succeeded for 30 or 40 days, the longest time ever, but he was a "nervous wreck." His first relapse, a cigarette smoked with a cup of coffee, felt like "the best thing that ever happened" to him.

In 1982, Boeken attended a Smoke Enders course for three or four weeks, attending three or four times a week. And in 1986 or 1987, he joined Smokers **[21]** Anonymous, a 12-step program. He was motivated to quit by more frequent bouts of bronchitis, as well as a continuing desire to run, but he claimed that he still did not know

that smoking caused lung cancer. Boeken tried Nicorette gum on more than one occasion, and patches, sometimes both at the same time, but he failed to quit.

After a three-month heroin addiction in the late 1960s, Boeken entered a methadone maintenance program, and quit methadone within three years. In the mid-seventies, Boeken went to Alcoholics Anonymous and stopped drinking in nine months. But he has never been successful at quitting smoking.

In 1981 or 1982, thinking it would lessen his bronchitis, Boeken switched to Marlboro "Lights," because they were lower in tar and nicotine, and "milder." As soon as Philip Morris began to market Marlboro "Ultralights," he switched to those.

In 1994, Boeken's mother, who smoked two packs a day until her death, died of lung cancer, and he had no more doubts about whether smoking caused cancer. On the news later the same year, Boeken saw portions of the testimony of tobacco company executives before Congress. They all denied that tobacco was addictive or harmful. They all denied under oath that it caused cancer. He knew they were lying about the cancer, but it was much later that he learned for the first time that accelerants, additives, or chemicals were added to the tobacco in his cigarettes, in order to increase their addictiveness.

Even then, Boeken was still unable to quit. In October 1999, he was diagnosed with lung cancer and underwent extremely painful surgery to remove the upper part of a lung, and then he began chemotherapy. By that time, however, the cancer had spread to his lymph nodes, and his chance of surviving the disease was less than one percent. Within a year, the cancer had spread to his brain, and there was no chance of survival. **[22]**

Boeken stopped smoking just before the surgery to remove part of his lung, but started taking an occasional puff or two after the first round of chemotherapy was over, because it calmed him. But he was shattered when he was diagnosed with brain cancer, and felt he needed more, so he bought a pack of Marlboro Reds, and was soon

smoking two or three packs a day.

Boeken testified that if Philip Morris had made it clear to him in the 1960s, the 1970s, or even the 1980s, that cigarettes cause lung cancer and death, he would not have smoked. At least, he thought he would have made an "honest effort" to quit. He also felt that if Philip Morris had admitted in the 1960s or 1970s, not only that smoking caused lung cancer, but also that Philip Morris added ingredients to Marlboro cigarettes in order to increase their addictiveness, he would have stopped smoking Marlboros.

Even before Boeken became a target member of a group of addicted smokers, Philip Morris targeted Boeken as a member of another group — adolescent boys. Until 1955, Marlboro was marketed primarily to women smokers. At that time, Philip Morris began to reposition the brandas masculine. From the mid-to-late 1950s, its ads featured a handsome, virile, tough and independent-looking young man with a tattoo, looking as though he could be a dashing movie star, a detective, a sailor, or a cowboy— the "Marlboro Man."

Marvin Goldberg, Ph.D., Boeken's marketing, advertising, and consumer behavior expert, explained how such advertising exerts a particularly powerful influence upon adolescent boys. He concluded from a review of Philip Morris's advertisements that they were intended to target young males from 10 to 18 years old, beginning in 1955. And, in Goldberg's opinion, the ads were aimed at young male "starters," first-time smokers.

Goldberg testified that child development literature suggests that young adolescents are just developing their self-concept, and that they are very self-**[23]** conscious. They feel that others are equally conscious of them, and want to appear to be mature, strong, independent, and masculine. If they see that a self-confidant, virile, and handsome man is smoking a certain brand of cigarette, they are likely to conclude that if they smoke that brand, they will look less fragile and vulnerable than they really are. And when their peers do the same, the cigarette

brand acts as a badge and a magnet.

Philip Morris advertised on popular family television shows in the 1950s and 1960s, such as "I Love Lucy," the most popular show in 1955. Other popular prime-time shows on which it advertised were "Red Skelton" and "Jackie Gleason," both comedy shows, "Rawhide," a western, "Perry Mason," a detective show, "Route 66," an adventure drama, and "Alfred Hitchcock" and "East Side West Side," suspense and mystery shows. "Rawhide" and "Route 66" involved characters similar to the masculine images in the ads of that period.

Television advertising has been shown to be very effective, particularly with children. And more than 30 percent of the audience for such shows as "Red Skelton" and "Jackie Gleason" consisted of children, well above the percentage of children in the population.

With this evidence in mind, we return to Philip Morris's contention that Boeken's fraud claim failed because he could not recall a particular advertisement that made him decide to smoke.

Goldberg testified that Boeken's inability to recall being influenced by any particular advertisement does not mean that it was not a cause of his smoking. Goldberg described the various media for advertising, and explained that the average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making repetition an important feature in advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become **[24]** familiar, creating associations in the minds of people who do not think them through. This results in "associative learning," andthose influenced by it are unlikely to be aware of it.

Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the

number of smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because "it's the thing to do."

And, as the Supreme Court recognized in *Mirkin*, as well as prior to *Mirkin*, "'[c]hildren in particular are unlikely to recall the specific advertisements which led them to desire a product. . . .' [Citation.]" (*Mirkin, supra*, 5 Cal.4th at p. 1099, quoting *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219.) Boeken's testimony bears this out. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. At the age of 12, he made play cigarettes from gum sticks, rolling them lengthwise. When he was thirteen years old, he began to smoke whole, real cigarettes. He did it because "everybody smoked. All adults smoked. It was fashionable. It was sophisticated. It was cool. It was adult. . . . Sports figures smoked. Race car drivers smoked. Everybody smoked. . . . All the kids smoked." Boeken wanted to be grown up. He was at "that age," and "that was the thing to do."

He wanted to smoke even though it was not pleasurable at first — it caused him to feel dizzy, faint, and to cough, and he had to "train" himself to inhale. At first, he smoked whatever brand he could get his hands on, and then he discovered vending machines, which allowed him to pick the brand he wanted. He used the vending machines in the coffee shops across from his junior high and high schools, where a pack of cigarettes cost only 25 cents and no one interfered. **[25]**

With the discovery of vending machines, Boeken was able to buy a particular brand, and he chose Marlboros, because "[t]hey were everywhere. They advertised everywhere." It was the cigarette of choice in his social set, his culture, and all his friends smoked Marlboros. Marlboro ads seemed to be everywhere — at baseball games, sporting events, racing events, and on racing cars. Boeken test-ified, "I was visually inundated with this brand of cigarette." And he was "impressed by the ads," although

he could not recall anything about any particular ads between 1957 and 1960. And no particular advertisement came to mind as a factor in his decision to smoke.

To Boeken, Marlboros represented a very macho, sophisticated, hip way of smoking. He perceived a message that it was the one and only cigarette to smoke. Boeken remembered the 1950s and 1960s as the age of Playboy Magazine, sophistication, machismo, and doing manly things, like smoking cigarettes.

In that era, Boeken thought of himself as a "real guy." At the time of his testimony, Boeken picked out several advertisements from the 1960s that looked familiar to him. He remembered the "Marlboro Country" ads, and the slogan, "Come to where the flavor is." Boeken also remembered billboards showing the "Marlboro man" with his lasso, and another with a healthy looking model in great shape jumping over a fence with one hand. Boeken thought that the healthy and robust images in the cowboy ads implied that Marlboros were good for you.

He thought the Marlboro man was a "man's man," like his hero, John Wayne. Boeken rode a motorcycle — his equivalent of John Wayne's horse, and in 1966, at the age 21, he rode around Europe on his motorcycle.

Over the years, another brand's ad campaign occasionally caught Boeken's attention, and he tried it for a few days, but always returned to Marlboros, although he was not sure exactly why. He knew he liked the taste better than other cigarettes — they were smoother, yet stronger. **[26]**

Thus, Boeken started smoking Marlboros as a child for reasons that track Philip Morris's advertising of the time, and he remembered their themes with fair certainty, as well as how they enticed him to smoke with false images of health, sophistication, and machismo.

"Substantial evidence means such evidence as a reasonable fact trier might accept as adequate to support a conclusion; evidence which has ponderable legal significance, which is reasonable in nature, credible and of solid value. [Citations.]" (*Guntert v. City of Stockton*

(1976) 55 Cal.App.3d 131, 142.) We conclude that the evidence of Boeken's actual reliance on Philip Morris's fraud meets this test.

3. Substantial Evidence Supports a Justifiable Reliance Finding

Philip Morris contends that Boeken's reliance upon its fraud was unreasonable and therefore, it suggests, unjustifiable as a matter of law. In support of this contention, Philip Morris relies in part upon Ohio law, as interpreted by a federal trial court in an unpublished memorandum opinion, *Glassner v. R.J. Reynolds Tobacco Co.* (N.D.Ohio Jun. 29, 1999) 1999 WL 33591006. Philip Morris claims that the federal court of appeals in *Glassner v. R.J. Reynolds Tobacco Co.*(6th Cir. 2000) 223 F.3d 343 affirmed the trial court's ruling that as a matter of law, evidence of common knowledge of the dangers of smoking requires a finding that reliance on the tobacco companies' fraud is unjustifiable. Philip Morris misreads the appellate opinion. While the court of appeals affirmed the judgment, it expressly disagreed with the district court's ruling on justifiable reliance. (See *id.* at p. 353.)

Philip Morris also relies upon Massachusetts law, as interpreted by a federal trial court. (E.g., *Massachusetts Lab. Health & Wel. v. Philip Morris* (D.Mass.1999) 62 F.Supp.2d 236, 244.) That court held that the facts alleged in the complaint filed by a union trust fund did not amount to justifiable reliance as a matter of law, but applied the same objective standard of reasonableness to both intentional misrepresentations and negligent misrepresentations. (See *id.* at p. 244.)

Under California law, which controls in this case, whether reliance was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Further, under California law, whether reliance is reasonable in an intentional fraud

case is not tested against the "standard of precaution or of minimum knowledge of a hypothetical, reasonable man." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415.)

"Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. [Citations.] 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' [Citations.] If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. [Citations.] 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth. . . .' [Citation.]" (*Seeger v. Odell, supra,* 18 Cal.2d at p. 415.)

Thus, whether Boeken's reliance upon Philip Morris's fraud was justifiable requires a factual inquiry. Nevertheless Philip Morris has failed to summarize the facts essential to such an inquiry.

As we have discussed, it is presumed that the evidence is sufficient to support the jury's factual findings, and it is the appellant's burden to demonstrate that it does not. (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.) **[28]** And in furtherance of that burden, the appellant must fairly summarize the facts in the light favorable to the judgment. (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.) Philip Morris's failure to do so has resulted in a forfeiture of this contention, as well. (See *ibid.*)

Beyond that, substantial evidence supports a finding that Boeken's reliance was justifiable. Boeken testified that his belief in the tobacco companies, rather than the Surgeon General, was wishful thinking or naïveté. But he had believed in the honesty of "big business." Further, Philip Morris had studied and understood nicotine addiction, and from the facts we have previously summarized, it is reasonable to infer that it knew and intended

that addicted smokers would use its misrepresentations and misleading statements to engage in denial and rationalization; and moreover, that smokers' ignorance of the increased addictiveness of Philip Morris's Marlboro brand would keep them smoking Marlboros and *ensure* their reliance upon such denial and rationalization.

4. *Product Liability*

We note, and Boeken points out in his brief, that Philip Morris has made no contention or argument in its opening brief with regard to the sufficiency of the evidence supporting the jury's verdict of product liability. The only contention made by Philip Morris in its opening brief with regard to the sufficiency of the evidence to support the product-liability claim was, in reality, a claim of instructional error, which we shall discuss in the next section.

Philip Morris raises a substantial evidence contention with regard to product liability for the first time in its reply brief. An assignment of error must be made in the opening brief, or it may be deemed waived. (See *Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584.) Philip Morris would have us find that it did, in fact, raise the issue in its opening brief, reasoning that by addressing the **[29]** sufficiency of the evidence to support a finding of fraudulent concealment, it necessarily addressed a failure to warn of the dangers of its product. [13]

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[13] Since we have found that substantial evidence supports the fraud verdict, even if there were insufficient evidence to support a claim for product liability the judgment would not have to be reversed. Although denominated, "special verdict," the verdict in this case was a general one, since it contained no findings of fact, and did not leave the judgment to the court. (*Shaw v.Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347, fn. 7; Code Civ. Proc., §§ 624, 625.) "'[W]here several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. [Citations.] When a situation of this character is presented it is a matter of no importance that the evidence may have

Philip Morris offers no authority or reasoned argument, however, for the suggestion that a failure to prove the elements of fraudulent concealment is necessarily fatal to a cause of action for product liability; and for this additional reason, we need not reach it. (See *Estate of Randall* (1924) 194 Cal. 725, 728-729.)

Notwithstanding the failure of Philip Morris to raise the issue in the opening brief, we have reviewed the record and we find sufficient evidence to support a product liability judgment.

The consumer expectations test is satisfied when the evidence shows that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.) Some degree of misuse and abuse of the product is foreseeable. (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833.) **[30]**

Dr. Benowitz testified that Marlboro "Lights" and "Ultralights" are not light at all, since they deliver more than 0.1 milligram nicotine and more than 1 milligram tar per cigarette to human smokers who compensate. Compensation occurs when the smoker adjusts the way he or she smokes in order to get a satisfying amount of nicotine, by covering the holes in the filter, sucking harder, drawing the smoke further into the lungs, and keeping it in longer.

Benowitz testified that studies have shown that most smokers believe that light cigarettes are safer than regular cigarettes, and the majority of smokers do not know that they compensate. Compensation by smokers draws carcinogens further into the lungs, which is more likely

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been insufficient to sustain a verdict in favor of the successful party on the other issues or that rever-sible errors were committed with regard to such issues.' [Citation.]" (*Mouchette v. Board of Education* (1990) 217 Cal.App. 3d 303, 315, disapproved on another ground in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 984, fn. 6; see also, *Henderson v. Harnischfeger* Corp. (1974) 12 Cal.3d 663, 673.)

to cause adenocarcinoma of the lung, a more aggressive form of cancer than those more prevalent among smokers of regular strength cigarettes.

Philip Morris suggests that the consumer expectations test is, in essence, one for failure to warn, and therefore preempted by the Public Health Cigarette Smoking Act of 1969.[14] Again, we disagree. Product liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test. (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 717.)[15]

We turn to Philip Morris's claims of instructional error. **[31]**

5. *Civil Code section 1714.45*

Philip Morris contends that Boeken was not entitled to a finding of product liability, whether measured under the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.[16]

We note that Philip Morris's request for BAJI No. 9.00.6 was made in a motion in limine relating to Civil Code section 1714. 45, and it was apparently withdrawn, as we discuss within, with no indication in the record that the request was renewed later. ""In a civil case, each of

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[14] See a more detailed discussion of the 1969 Act, within.

[15] Since smokers do not know they compensate, a warning may not make the product any safer. Philip Morris's own expert, Dr. Richard Carchmann, admitted that the only way to reduce the risk is to quit smoking.

[16] BAJI No. 9.00.6 reads: "The (manufacturer or seller) of a product is not liable for [injuries] [death] caused by a defect in its design, which existed when the product left the possession of the (manufacturer or seller), if: [¶] 1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and [¶] 2. The product is a common consumer product intended for personal consumption."

the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion." [Citations.]' [Citation.]" (*Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701.) Nor is the trial court required to give an instruction that a party has withdrawn. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).)

Philip Morris contends that Boeken failed to prove the elements of product liability, because "[a] defendant . . . may not be held liable for selling a legal product merely because that product is inherently dangerous." Philip Morris cites BAJI No. 9.00.6 as the only authority for this contention. BAJI No. 9.00.6 is derived from the former version of Civil Code section 1714.45, which provided **[32]** cigarette manufacturers with immunity from product liability actions.[17] (Stats.1987, ch. 1498, § 3, p. 5778; see *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 837 (*Myers*).) Before we discuss the instructional issues, we must first address the history of the immunity statute.

The statute was originally passed in 1987 and, as pertinent, provided: "In a product liability action, a manufacturer or seller shall not be liable if: [¶] (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and [¶] (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts." (Italics added.)

Thus, as originally enacted in 1987, the statute's enumerated examples of common consumer products included tobacco. (See Stats.1987, ch. 1498, § 3, p. 5778;

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[17] We shall hereinafter refer to the statute as section 1714.45 or "the immunity statute."

Naegele v. R.J. Reynolds Tobacco Co. (2002) 28 Cal.4th 856, 860-862,(*Naegele*).) It was based upon the position taken in Comment i of Section 402A of the Restatement (Second) of Torts, that "'a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers.' [Citation.]" (*Naegele, supra*, 28 Cal.4th at p. 864, italics in the original, underlining ours.)

In 1997, the Legislature amended section 1714.45 to rescind the statutory immunity for tobacco companies as of January 1, 1998. (Stats.1997, ch. 570, § 1; see *Myers, supra*, 28 Cal.4th at pp. 832-833, 837.) Thus, "while the Immunity **[33]** Statute was in effect — from January 1, 1988, through December 31, 1997 — no tortious liability attached to a tobacco company's production and distribution of pure and *unadulterated* tobacco products to smokers. [Citations.]" (*Myers, supra*, at p. 840, italics added.)

The statute was expressly retroactive, and while it was in effect it immunized tobacco manufacturers from liability for conduct before, as well as during the ten-year period. (*Myers, supra*, 28 Cal.4th at p. 847; *Souders v. Philip Morris Inc.* (2002) 104 Cal.App.4th 15, 24, fn. 7.) Once it was repealed, however, the statute's retroactive effect was nullified, and tobacco companies were no longer immune to liability for conduct occurring prior to 1988.[18] (*Myers, supra*, 28 Cal.4th at p. 847.) Therefore, at the time of trial in 2001, BAJI No. 9.00.6 no longer applied to cigarettes. (See Comment to BAJI No. 9.00.6 (Jan. ed. 2004); Stats.1997, ch. 570 (S.B.67), § 1.)

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[18] In *Myers*, the Ninth Circuit Court of Appeals had certified the following question to the California Supreme Court: "Do the amendments to Cal. Civ.Code § 1714.45 that became effective on January 1, 1998, apply to a claim that accrued after January 1, 1998, but which is based on conduct that occurred prior to January 1, 1998?" (*Myers, supra*, 28 Cal.4th at p. 839.)

Neither *Myers* nor *Naegele* had been decided when Philip Morris filed its opening brief. Consistent with the law before those cases were decided, in its opening brief, Philip Morris argued that repeal of the original section 1714.45 did not nullify its retroactivity, and that it retained immunity from liability that would otherwise have arisen not only prior to 1998, but also prior to the statute's passage in 1987. Before Philip Morris filed its reply brief, *Naegele* and *Myers* were published. *Myers* held that the immunity statute applied to tobacco only during the ten years beginning January 1, 1988 and ending December 31, 1997. (*Myers*, **[34]** *supra*, 28 Cal.4th at p. 837.) *Naegele* confirmed this and also held that the protection of the ten-year immunity statute did not "extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (*Naegele, supra*, 28 Cal.4th at p. 861.)

Although Philip Morris addressed Naegele and *Myers* in its reply brief, we permitted it to file a supplemental opening brief. For the first time in its supplemental brief, Philip Morris claims that it requested and submitted a jury instruction that would have limited its liability for any wrongs committed during the ten-year immunity period, proposed instruction O.

Philip Morris's packet of proposed jury instructions, filed on May 16, 2001, included that proposed instruction, which reads:

> "You may not find defendant liable on plaintiff's claims of design defect, negligence, fraud andconspiracy or failure to warn based on anything that defendant did or did not do between January 1, 1988, and December 31, 1997. It was the policy of California during that period to recognize cigarettes as inherently unsafe products that could nevertheless be lawfully sold because they carried adequate warnings regarding their

> dangers, and to encourage the continued availability ofcigarettes and other tobacco products to those adult consumers who wished to use them. This was accomplished by a law that protected producers or suppliers of cigarettes or other tobacco products from legal responsibility for harms suffered by those who voluntarily consumed such products. That law was repealed as of January 1, 1998, and has no legal effect with respect to conduct since that date, and also has no legal effect with respect to plaintiff's claim for breach of express warranty." **[35]**

The problem we have is that we have found no ruling by the trial court rejecting this instruction. The instruction conference was unreported. We did find a cover sheet signed by the trial judge, and file-stamped June 6, 2001, which is entitled," Instructions — Refused Withdrawn, Consisting of 10 pages herein." But the ten pages are not attached, unless the cover sheet was meant to refer to the ten pages attached to the document immediately following it in the Clerk's Transcript.

The document immediately following the trial court's cover sheet is entitled, "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant." The ten pages that follow contain seven proposed instructions. Proposed Instruction O is not among them.

We requested Philip Morris to provide us with the exact page numbers in the appellate record where the trial court's refusal to give its proposed Instruction O might be found, or to augment the record with a copy of the trial court's minute order or additional reporter's transcript, if any, showing the refusal, or to inform this court if there was no such order or ruling.

Rather than directly respond to our request, Philip Morris filed a letter brief suggesting that we must assume that the instructions were proposed and rejected, because the record is silent with regard to an express ruling, and

the instruction conference was in chambers. As authority for its suggestion, Philip Morris states that it knows of no authority to the contrary.

In fact, there is no shortage of authority to the contrary. It is well established that error cannot be presumed, and it is the appellant's burden to provide a record sufficient to show the asserted error. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)

Philip Morris also filed a motion to augment the record, but not with an agreed or settled statement reflecting the in camera instruction conference or any ruling on the instructions. (See *Maria P. v. Riles, supra*, 43 Cal.3d at p. 1295; *In* **[36]** *re Kathy P.* (1979) 25 Cal.3d 91, 102; Cal. Rules of Court, rules 6, 7, 12(a).) Instead, Philip Morris seeks to augment the record with the trial court's statement of decision regarding Philip Morris's pretrial motion for summary adjudication, in an attempt to show that requesting an instruction or a ruling on the supposedly proposed instruction would have been futile, because the trial court had already ruled against it on that issue.

We grant the motion because the statement of decision was part of the trial court record, but find it ineffective for Philip Morris's purpose. Philip Morris did not raise the issue of partial retroactivity or a ten-year immunity period in its motion for summary adjudication, and the statement of decision addressed only Philip Morris's claim of immunity for all pre-1998 conduct, not just conduct from 1988 to 1998.

The judgment is presumed correct, and error is never presumed. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) A claim of error by a party who fails to provide the record necessary to determine upon what basis the trial court made its order must be resolved against that party. (*Maria P. v. Riles, supra*, 43 Cal.3d at p. 1295.) And we must presume that the basis upon which the trial court made its order was a proper one. (*Rossiter v. Benoit, supra*, 88 Cal.App.3d at p. 712.)

We presume, therefore, that Philip Morris abandoned,

either expressly or implicitly, its request for Proposed Instruction No. O. This presumption is consistent with the legal position asserted by Philip Morris at trial and through its opening brief on appeal: that the statute immunized it from liability for all conduct prior to January 1, 1998, including all conduct preceding January 1, 1988, not just for the ten year period the statute was in force. A party is not entitled to instructions with regard to a theory or defense that the party has not advanced. (See *Soule v. General Motors Corp., supra*, 8 Cal.4th at p. 572.) **[37]**

We also note that instruction O was incomplete because it did not incorporate the term "unadulterated" within its language. Philip Morris argues that the omission was so minor as to require the trial court to modify the instruction. We disagree. "A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may, as he did here, properly refuse it. [Citations.]" (*Truman v. Thomas* (1980) 27 Cal.3d 285, 301.)

Philip Morris states in its reply brief that "there is no evidence that Philip Morris, during the 1960s or at any other time, was adding things to Marlboro cigarettes . . . for the purpose of addicting plaintiff or any other smoker." In fact, there is more than ample evidence in the record that Philip Morris incorporated additives that not only increased the risk of harm from nicotine, but also created harmful effects not inherent in smoking unadulterated tobacco, thereby eliminating any immunity Philip Morris might otherwise have enjoyed from 1988 to 1998. (See *Naegele, supra*, 28 Cal.4th at pp. 864-865; *Myers, supra*, 28 Cal.4th at p. 837.)

Philip Morris's own expert, Dr. Carchmann, who had been employed by Philip Morris for ten years, admitted that Philip Morris adds compounds, such as urea, that release ammonia in the tobacco, and flavorings, such as chocolate and licorice, although he claimed that it was done only to enhance flavor and sensation to smoking, and he denied that it had any adverse effect.

Benowitz testified that ammonia raises the alkaline level, or PH, of tobacco, and the higher the PH, the more free-base nicotine is delivered to the smoker. Contrary to Philip Morris's contention that there was no evidence showing that ammonia causes any negative health effect beyond those inherent in tobacco, or that it makes tobacco more addictive, Philip Morris's former director of applied research in its research and development department, Dr. Farone, testified that **[38]** although nicotine does not cause cancer, it does have harmful effects on the nervous system. Dr. Mele testified that nicotine has adverse cardiovascular effects, raising the heart rate and blood pressure.

Farone testified that urea, which turns to ammonia, was added by Philip Morris to its cigarettes in order to create *more* nicotine. A thorough explanation of the ill effects of nicotine was provided by Benowitz, whose research over the past 25 years has been into the effects of nicotine, nicotine addiction, smoking behavior, and smoking-related illnesses. Nicotine is similar to the hormone, ACH, which is responsible for nerve communication, and is highly concentrated in the brain.[19] ACH binds to receptors, proteins, which results in the release of other hormones that affect mood and behavior.

One of the hormones released when a receptor is activated is dopamine, which causes pleasure. Other hormones stimulate and help concentration; still others act like an anti-depressant; while others control the appetite. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Smoking controls mood and behavior in this way, and since smoking delivers nicotine directly from the lungs to the heart and brain, it achieves its effect in seconds. Since immediate reinforcement encourages addiction, smoking is the delivery system that causes the fastest addiction. The smoker's brain is never the same as a never-smoker,

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[19] See footnote 4, *ante*.

even after he manages to quit.

The *more nicotine delivered* to the brain, the more the receptors are stimulated, increasing the smoker's tolerance as the brain tries to normalize. Eventually, the structure of the brain changes, and smokers develop more and more nicotine receptors. Farone testified that adding urea causes *more* nicotine to be **[39]** delivered by the gas produced by smoking each cigarette, thus increasing Marlboro's effectiveness and speed in causing addiction.

Philip Morris claims that Benowitz testified that there was no evidence that ammonia causes any negative health effects, but its argument is not only incorrect, it is also very misleading. Philip Morris refers to Benowitz's testimony in which he merely said that he had not *reviewed* any published research relating to Farone's nicotine displacement theory. Philip Morris ignores Farone's testimony that adding urea increases ammonia, which in turn "pushes" more nicotine into the smoke.

The evidence also established, contrary to Philip Morris's assertions, that additives contributed to Boeken's lung cancer. By the age of 14, Boeken smoked every day, at least two packs a day, and continued for 40 years, unable to quit for more than a brief period even after he was diagnosed with lung cancer. According to Benowitz, Boeken was not just addicted to cigarettes, he was highly addicted. The increased ammonia had done its job of addicting more effectively and more quickly.

Further, Farone testified that 20 percent of the contents of a cigarette consists of added flavorings. Flavorings such as chocolate and licorice are not added simply to improve the taste, but also to make it easier to inhale the smoke by creating bronchodilators, which open up the lungs. Cigarettes that are easier to smoke allow carcinogens to reach deeper into the lungs, which can lead to adenocarcinoma, the very aggressive and fast-spreading cancer from which Boeken suffered.

Epidemiologist and oncologist, Gary Strauss, explained that when cigarettes are more irritating, people do not inhale deeply, and the central part of the lungs is the

area primarily exposed to cancer-causing particulates. The more deadly adenocarcinomas, however, grow in the periphery, that is, the end of the lung, **[40]** reached by deeper inhaling. The incidence of these cancers has increased in recent years and that increase is attributable to low-tar cigarettes.

Even if Philip Morris did not withdraw Proposed Instruction O, and the court refused to give the instruction, the court did not err.

6. *Federal Preemption Contentions*

Philip Morris contends that certain evidence, argument, and claims were preempted by the Public Health Cigarette Smoking Act of 1969, and that the trial court failed to instruct the jury properly "on this point." Its contentions are twofold: (1) the trial court erred by refusing to "instruct the jury, as Philip Morris requested, that it could not hold Philip Morris liable on the ground that its post-1969 advertising contained supposedly 'glamorous' and 'healthy' imagery"; and (2) that the trial court erroneously "admitted, over Philip Morris's objection, evidence that Philip Morris's advertising contained such imagery."

The 1969 Act requires a particular warning, or a variation of it, to appear in a conspicuous place on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc.*, *supra*, 505 U.S. at pp. 515-518, 525 (*Cipollone*).) It also explicitly reserves authority to The Federal Trade Commission to identify and punish deceptive advertising practices relating to smoking and health. (*Cipollone, supra*, at p. 529; 15 U.S.C. § 1336.) The United States Supreme Court has construed the 1969 Act as preempting damage claims based upon a failure-to-warn theory that requires a showing that post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, or that its advertising tended to minimize or neutralize the health hazards associated with smoking. (*Cipollone v.*

Liggett Group, Inc., supra, 505 U.S. at pp. 524, 527-528.)
[41]

Philip Morris claims that it requested two instructions relating to federally preempted advertising, and that the trial court refused both requests. The first of the two instructions at issue was requested orally during the testimony of Boeken's expert on nicotine addition, Benowitz. Philip Morris has summarized neither the testimony nor its discussion with the court, has not put its request for this instruction in context, and has not summarized the court's ruling, which was not simply a refusal to give a requested instruction, as we shall explain. We begin with a summary of the relevant portions of the record.

Philip Morris objected during Benowitz's testimony regarding the use of healthy, sexy, happy models in advertisements, and moved for a mistrial. The court disagreed with that characterization of the testimony, and denied the mistrial, but offered to instruct the jury to disregard whatever it had heard from this particular witness with regard to advertisements. Philip Morris's counsel, Mr.Leiter, replied, "We would ask that the court affirmatively instruct the jury that it may not find liability in this case based on any accusation or any evidence that healthy images in ads undercut the health warnings mandated by the Congress." The court refused to give this specifically requested language. But contrary to Philip Morris's suggestion that no instruction was given on the issue, the court did instruct as follows: "Ladies and gentlemen, just before we took the break, there was some testimony from this witness regarding certain advertising images and their potential effects. You'll recall that testimony. [¶] I instruct you at this time that with respect to that testimony, I want you to *disregard it for all purposes and do not use it for any purpose whatsoever* in this trial." (Italics added.)

Since Philip Morris has referred to nothing to the contrary, we presume the jury followed the court's instruction. (See *People v. Harris* (1994) 9 Cal.4th 407,

426.) **[42]**

The second instruction that Philip Morris claims the court erroneously refused was its proposed instruction J. It reads as follows:

> "Regardless of any of the other rules of law set forth in these instructions, you must follow the rules of federal law which I shall now give you.
>
> "Because of federal law, you cannot hold defendant liable on the basis that after July 1, 1969, it should have included additional or more clearly-stated warnings in the advertising or promotion of [its] cigarettes because, as a matter of federal law, after July 1, 1969, defendant adequately warned plaintiff of the health risks of smoking, including 'addiction.'
>
> "Also because of federal law, and except only as stated below, you cannot hold defendant liable on the basis that it:
>
> "(a) through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings appearing on every cigarette package after July 1, 1969, or
>
> "(b) after July 1, 1969, failed to disclose, or concealed, or suppressed information about the health risks of smoking including 'addiction.'
>
> "The federal law does not limit the potential liability of defendant against claims that its product was defective in design in other respects, or that the defendant was negligent in other respects in the design of their product. The federal law also does not limit the potential liability of defendant against claims that it made affirmative misrepresentations about the health risks of smoking."

As with Proposed Instruction No. O, we find no ruling by the trial court rejecting this instruction. Our request

for a citation to the record for the trial court's purported refusal of Instruction No. O also included a request for a citation **[43]** to the court's purported refusal of Philip Morris's proposed Instruction No. J. Philip Morris has provided no such citation, and has not attempted to augment the record with an agreed or settled statement. (See *Maria P. v. Riles, supra*, 43 Cal.3d at p.1295; *In re Kathy P., supra*, 25 Cal.3d at p. 102; Cal. Rules of Court, rules 6, 7, 12(a).) But we did find Proposed Instruction J in the group of instructions under cover of the "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant."

If the trial court did, in fact, refuse Instruction No. J, Philip Morris has failed to demonstrate error. A trial court is not required to give instructions in the precise language proposed, and it is not error to refuse instructions that are not reasonably brief, concise, and understandable to the average juror. (*Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764.)

"Proposed instructions which are argumentative and misleading should not be given. [Citation.] Instructions should not draw the jury's attention to particular facts. It is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] . . . Repetitious reference, in the instructions, that under the circumstances related the jury 'must find in favor . . . of defendant' has been condemned. [Citation.]" (*Dodge v. San Diego Electric Ry. Co., supra*, 92 Cal.App.2d at p. 764.) Instruction J suffered from all these infirmities, and the trial court had no duty to give it.

Philip Morris's second contention with regard to the 1969 Act is that the trial court erred in permitting Dr. Goldberg to testify at length and over its objection about preempted, post-1969 advertising. In that testimony, which took place on April 17, 2001, Goldberg referred to

several exhibits which have not been made a **[44]** part of the record on appeal. He described them as advertisements that demonstrate an intent to market Marlboro cigarettes to adolescent males, and to turn youthful nonsmokers into smokers.

A judgment may not be reversed unless the record shows that the appellant made a timely objection to or a motion to exclude or to strike the evidence and that the specific ground of the objection or motion was stated. (Evid.Code, § 353, subd. (a).)

Philip Morris contends that its objection was made in its motion in limine No. 1, which stated a general objection to any and all evidence that might relate to preempted advertising. Philip Morris's motion in limine did not, however, specify any particular evidence to be excluded, and did not mention the Goldberg testimony about which it now complains.

A motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence and was made at a time when the trial court could determine the evidentiary question in its appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Thus, Philip Morris's motion in limine did not preserve the issue for appeal.

Philip Morris also contends that the court gave it a "running objection . . . to this whole area." The court allowed Philip Morris a "running objection" in a discussion which took place the day before the Goldberg testimony now in question, and although it does appear that the court may have been referring to evidence of preempted advertising, the discussion on that day was precipitated by Philip Morris's objection *on the ground of relevance* to testimony concerning the targeting of youthful smokers after Boeken became an adult. Philip Morris's counsel, Mr. Leiter, made it clear to the court that *he was not objecting to post-*1969 *youth-targeted advertising on the ground of federal preemption.* **[45]**

On the day at issue, April 17, 2001, after Goldberg read an excerpt from an article about youth smoking, Leiter said, "Your Honor, may we have our standing objection," but he did not explain what standing objection he had in mind. The judge assented, apparently thinking that he understood to which objection counsel was referring, and he then took the matter up outside the jury's presence. The ensuing discussion began in relation to targeting youth smokers, and the court referred to a discussion of the subject the day before, April 16, 2001.

In the April 17 discussion, it was again the court that brought up the issue of preemption. Counsel for Boeken offered to stipulate to having the court strike the article from which Goldberg had read. Leiter responded that he would prefer a limiting instruction, either at that time or later in the trial, regarding the proper use of the testimony and warning against the improper use of it under *Cipollone*. The court agreed to give such an instruction once it had "an appropriately written jury instruction" before it. Leiter agreed, with the understanding that he continue to have "a standing objection to all such testimony." The court replied, "You do, you do," and ruled that the "current information with the exception of erosion type suggestions" was relevant to an understanding of what occurred in the 1950s, when Boeken started smoking.

Thus, it appears that Philip Morris did not object to the Goldberg testimony regarding post-1969 advertisements, and whatever its vague "running" or "standing" objection was, it did not comply with Evidence Code section 353, subdivision (a). (*People v. Morris, supra*, 53 Cal.3d at pp.188-190.)

The testimony to which Philip Morris did object concerned an excerpt from an article regarding the targeting of youth smokers, and Philip Morris refused an offer to stipulate to the court's striking that testimony, agreeing instead upon a limiting instruction to be submitted in writing. Even if Philip Morris could bootstrap its objection to the reading of the article into an objection to the **[46]** testimony that preceded it, it may not complain

on appeal about the admission of evidence that it induced the court not to strike. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

We conclude that Philip Morris has not preserved the issue for appeal. In any event, "[n]o judgment shall be set aside . . . on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) The burden is on Philip Morris, as appellant, to show that error has resulted in a miscarriage of justice. (*Cucinella v. Weston Biscuit Co., supra*, 42 Cal.2d at p. 83.) Further, Philip Morris "bears the duty of spelling out in [its] brief exactly how the error caused a miscarriage of justice." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Philip Morris's prejudice argument is apparently based upon factors suggested by the California Supreme Court to determine whether an error of instructional omission was prejudicial — "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule, supra*, 8 Cal.4th at pp. 580-581.)

But the only factor cited by Philip Morris that might have any merit, if the instruction had been erroneously refused, is its assertion with regard to the fourth factor — an indication by the jury itself that it was misled. The closeness of the jury's verdict is such an indicator (see *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1070), and Philip Morris points out that there was a nine-to-three verdict with regard to failure to warn prior to July 1, 1969.

With regard to the first factor, however, although Philip Morris contends that Boeken "introduced a substantial amount of evidence . . . of supposedly glamorous **[47]** and healthy imagery in its post-1969 advertising," Philip Morris points only to the admission of the Goldberg testimony (to which Philip Morris did not object, as we

have already discussed) regarding exhibits that have not been made a part of the record on appeal.

We must point out again that it is Philip Morris's burden to provide an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) When contentions are based upon exhibits that Philip Morris has not made a part of the record, it may be assumed that such contentions have been abandoned. (*Brown v. Copp* (1951) 105 Cal.App.2d 1, 8.)

Philip Morris has made no effort to discuss the second *Soule* factor — the effect of other instructions. It does not summarize, discuss, or even mention the instructions that were given. Instead, it suggests that no instruction was given at all with regard to post-1969 advertising and promotion, with a misleading assertion that the "trial court issued no instruction that cured its failure to give Philip Morris's proposed instruction." In fact, the trial court instructed the jury regarding the 1969 limitations throughout its charge.

With regard to fraudulent concealment, the court instructed, "[F]ailure to disclose . . . is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose . . . prior to July 1, 1969." The special verdict form asked, "Prior to July 1, 1969, did defendant conceal or suppress a material fact?"

With regard to the product liability claim, the court instructed, "A product may be defective because of a defect in design or a failure to adequately warn the consumer prior to July 1, 1969"; and, "[A] product is defective if the manufacturer . . . has a duty to warn of dangers and fails to provide an adequate warning of those dangers prior to July 1, 1969, a date established by law in this case"; and, "A cigarette manufacturer has a duty to warn prior to July 1, 1969 if [etc.]"; and, "For **[48]** the period prior to July 1, 1969, one who supplied a product . . . has a duty to use reasonable care to give warning."

Further, the special verdict form asked, "Was there either (1) a defect in design, or (2) a defect resulting from

a failure to warn occurring before July 1, 1969?"

Thus, the jury was not permitted, as Philip Morris contends, to base liability upon a failure to warn after July 1, 1969, or upon advertising that minimized or neutralized the federally mandated warning after that date.

With regard to the fourth *Soule* factor, the effect of counsel's arguments, Philip Morris complains that opposing counsel was permitted to argue that Philip Morris was the "'devil' because of its allegedly glamorous advertising practices"; that Philip Morris "'spent hundreds of millions and billions of dollars putting out advertising images to the exact contrary' of the dangers of smoking"; that "Marlboro is on the side of Ferraris in Formula One Racing [and] guys, especially, who see themselves, adventurous or resourceful or strong go for that.' Mr. Boeken did. He saw himself as that man."

If opposing counsel's argument tended to minimize or neutralize federally mandated warnings, it was incumbent upon Philip Morris to object and request that the jury be admonished. (See *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318.) Since it did not do so, it waived any contention based upon improper argument. (*Id.* at p. 318; *Horn v. Atchison T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.)

We conclude that Philip Morris has failed to meet its burden to show that the trial court erred by refusing its instructions, as well as its burden to show that any such refusal amounted to a miscarriage of justice. **[49]**

7. *Impeachment with Felony Conviction*

Philip Morris contends that the trial court abused its discretion in refusing to allow it to impeach Boeken with a 1992 felony wire fraud conviction.

Boeken brought a motion in limine to exclude any reference to his three criminal convictions, one in 1972 for receiving stolen property, one in 1976 for possession of heroin, and the 1992 wire fraud conviction. For the latter,

Boeken had been convicted after pleading guilty pursuant to a plea bargain to one count of wire fraud as an aider and abettor. (See 18 U.S.C. §§ 1343, 2(a).) He admitted having sold a fraudulent investment in 1987 while employed as a securities salesman.

The motion in limine was granted *without* prejudice, after which the following exchange occurred:

> "THE COURT: At this time, what I will do is I will grant the motion in limine in its entirety as to the felony convictions and they will not be admitted for any purpose, nor will counsel refer to it in any way, either directly or indirectly, through counsel or through any witnesses that may take the stand.
>
> "It's without prejudice.
>
> "If we get very far into any character issues —
>
> "MR. LEITER: And by suggesting we defer it, I hadn't anticipated Your Honor was going to rule.
>
> "THE COURT: I know you did.
>
> "MR. LEITER: Obviously, credibility of the plaintiff is a key issue in the case. Income is a key issue in the case. And the conviction goes to both. And we would like to be heard on both of those issues, either now or at the appropriate time. **[50]**
>
> "THE COURT: All I can say to you is that I am certainly willing to listen. But based on the information that I have at the present time that's been presented to me in this motion in limine, I looked at it, I thought about it long and hard, balanced the 352 issues, it turns out from what I have seen so far, I am satisfied that I made — that my instincts led me in the right direction and it was correct not to admit this evidence and that it would have been the very effects that 352 is designed to prevent occurring in a trial.

"But at the same time, I haven't seen everything, and there must be a certain amount of openness. But at the present time, this motion is granted."

Philip Morris did not raise the issue again until its motion for new trial. It now contends that the court abused its discretion in excluding the conviction, for three reasons: it was not too remote; fraud is probative on the issue of credibility; and Boeken's veracity was a "central issue."

The trial court's determination whether to admit or exclude a prior felony conviction for purposes of impeachment is made pursuant to Evidence Code section 352. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.) Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

An exercise of discretion under section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

We agree that a fraud conviction is probative with regard to credibility. But Philip Morris has not shown that its exclusion was arbitrary, capricious, or patently **[51]** absurd, or that it resulted in a manifest miscarriage of justice. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) Notably absent from Philip Morris's argument is any contention that the probative value of the conviction might outweigh the obvious consumption of time that would have been taken up by the issue.

8. *Juror Misconduct*

Philip Morris contends that the trial court erred in removing a juror during deliberations.

The trial court's discretion to discharge a juror who refuses to deliberate is reviewed for abuse of discretion, and will be upheld if there is any substantial evidence supporting the ruling, so long as the juror's refusal to deliberate appears in the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474-475.)

On the morning of May 23, 2001, one day into deliberations, the foreman sent out two notes to the judge stating, among other things: "We . . . need instruction regarding Juror # 5 . . . who is not participating in the discussion. She sits away from the table and reads her bible instead of contributing to the group conversation"; and, "Can we discuss the distraction regarding Juror # 5 . . . . She is not seating [*sic*] with us during the discussion. She instead chooses to read her bible and does not contribute to the group conversation." [20]

In response to the note, the court reread to the jury the following excerpt from BAJI No. 15.52: "All jurors should participate in all deliberations." **[52]**

Later, the foreperson sent out another note. "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [*sic*] with [Juror No. 5] about this."

The court then questioned Juror No. 5 separately in chambers. She denied that she had been reading her Bible during deliberations, although she kept it in front of her. She admitted that she did not sit "all the way up" at the

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[20] The record is not clear on the timing and sequence of the various notes.

table, but denied that she sat away from the table, failed to listen, or slept during deliberations.

Juror No. 5 explained to the court that questions had been raised in the jury room about her addiction to morphine, and she found that avoiding eye contact helped her to avoid painful memories. She did this for "[her] own sanity." She then admitted that she had been sitting in the corner, explaining that she could not be expected to sit there and "giggly-gaggly play little games," because she was "not that hypocritical."

The trial judge urged Juror No. 5 to participate, to explain her concerns to the other jurors, and to ask them to be courteous, since they probably would attempt to get along if they understood her feelings. Juror No. 5 responded that she got along with individual jurors, but "now it is like them against me." The judge explained that deliberating means listening, sharing her views, and participating. Juror No. 5 replied, "I totally agree. I have attempted to do that." She agreed to go back in, talk to the other jurors, and to try to "square it away."

Later that day, however, the foreperson sent out another note, which read: "Wish to speak with the judge on a one and one basis regarding [Juror No. 5]. We feel that she is being disruptive and have [*sic*] shown animosity towards some of the jurors who has [*sic*] spoken to her regarding the reading and participation"; **[53]** and, "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [*sic*] with [Juror No. 5] about this."

The court then undertook to question each juror individually in chambers. The judge was careful to caution each juror not to reveal the contents of deliberations, and asked for any comments about the information he had received regarding some difficulty concerning one of the jurors.

Juror No. 2 reported that the trouble began after Juror No. 5 became angry when she was not elected foreperson. It appeared to Juror No. 11 that Juror No. 5's personality totally changed once the foreperson was picked. Juror No. 6, the foreperson, reported that Juror No. 5 participated until she failed to win election as foreperson. She then became hostile, and warned Juror No. 6 that she would "shut it down" if she were not left alone.

Six jurors reported that Juror No. 5 would sit with her back turned against the other jurors, and Juror No. 5 admitted turning her chair around and sitting with her back to the other jurors on both days of deliberations.

Juror No. 1 reported that Juror No. 5 would not sit with the others, and that she either read her book or appeared to sleep during deliberations. Five more jurors reported either that Juror No. 5 appeared to be sleeping much of the time, or she sat with her eyes closed.

Jurors No. 7, 8, and 9 reported that Juror No. 5 never looked at the exhibits, and the latter two reported that she did not review her notes. Eleven jurors reported that Juror No. 5 read her book while the others deliberated. Juror No. 5 admitted that she read a novel (not the Bible) during deliberations, although she then claimed that she was not actually reading. Juror No. 11 thought that Juror No. **[54]** 5 was, in fact, reading, since she smiled occasionally while looking at her book, and the smile obviously did not relate to any discussion among the other jurors.

Ignoring the reports we have just summarized, Philip Morris points to comments by several jurors, including Juror No. 5, which would have supported a contrary resolution of the issue by the trial court. But we must accept the trial court's resolution of credibility issues and factual conflicts, unless they are not supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Many of the juror statements upon which Philip Morris relies consist of the jurors' impressions and opinions. For example, Philip Morris quotes Juror No. 12,

who said, "I think she's paying attention because when she hears . . . things and when she's ready to apply her input, she does it." But Juror No. 12 could not say whether Juror No. 5 was giving her full attention, or whether she had been really reading, and surmised that she was just making a gesture, like turning her back. It was the function of the trial court, considering all the circumstances, to make that determination. (See *People v. Cleveland, supra*, 25 Cal.4th at p. 485; *People v. Nesler, supra*, 16 Cal.4th at p. 582.)

Philip Morris lists various other juror statements that would support a different decision. Juror No. 5 voted, and five jurors said either that she gave her input or that she voiced her opinion on several different occasions, perhaps as many as five or six. Juror No. 1 said, however, that Juror No. 5 would respond only to questions put directly to her. And according to Juror No. 7, those responses consisted only of answering "yes" or "no," or repeating, "I hear you, I hear you, I hear you," when any comments were made to her.

Philip Morris also points out that many of the jurors were not certain whether Juror No. 5 had actually been asleep when her eyes were closed. But Juror No. 2 told the court that Juror No. 5 appeared to be sleeping when her eyes were closed, because she would lean in her chair, sometimes all the way over one **[55]** side or the other. Juror No. 4 thought she was sleeping, because she closed her book and put her head down. Such physical indicia as eye closures, head nodding, and slumping in one's chair provide ample evidence of sleeping. (*People v. Johnson* (1993) 6 Cal.4th 1, 21.)

Philip Morris also attaches to its opening brief a declaration of Juror No. 5 dated June 7, 2001, and a letter from one of the other jurors, posted on the Internet on June 23, 2001. Since there has been no showing that either document was before the trial court at any time, we decline to consider them. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.)

Philip Morris suggests that the facts of this case are similar to those of *People v. Bowers* (2001) 87 Cal.App.4th 722 (*Bowers*), which were held to justify a reversal. (See *id.* at p. 735.) We disagree. In *Bowers*, only one other juror reported that the discharged juror had slept, and there was no evidence of how long or how frequently. (*Id.* at p. 731.) Here, *all* the other jurors reported that Juror No. 5 appeared to sleep or read throughout the two days of deliberations.

In *Bowers*, behavior reported as inattentiveness consisted of the juror's habit of walking around with his arms crossed and refusing to respond, as a means of expressing that he did not agree with the other jurors' evaluation of the evidence. (*Bowers*, *supra*, 87 Cal.App.4th at pp. 730-731.) Here, substantial evidence established that Juror No. 5 separated herself physically from the other jurors, did not pay attention to their deliberations, and instead, slept or read a novel throughout the two days during which she was a member of the deliberating jury.

We conclude that such circumstances support a finding of a "demonstrable reality" that Juror No. 5 refused or was unable to deliberate, and that the trial court did not, therefore, abuse its discretion in discharging her. (See *People v. Cleveland*, *supra*, 25 Cal.4th at p. 484.) **[56]**

9. *Punitive Damages*

Philip Morris moved for a new trial on the jury's award of $3 billion in punitive damages. The trial court denied the motion, conditioned upon Boeken's acceptance of a reduction of punitive damages to $100 million. Boeken accepted the reduction.

Philip Morris contends that even the reduced punitive damage award is excessive, whether measured under California law or the United States Constitution. In her cross-appeal, Boeken contends that the trial court erred in reducing the award. We begin our review under the United States Constitution.

Punitive damage awards that are grossly excessive in relation to a state's legitimate interests in punishing unlawful conduct and deterring its repetition, violate a defendant's right to due process, guaranteed under the Fourteenth Amendment. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 (*BMW*).)

When it is asserted, as here, that an award is so grossly excessive as to violate due process, certain "guideposts" may provide meaningful assistance to the appellate court's review. (*BMW, supra*, 517 U.S. at pp. 574-575.) The *BMW* guideposts are "(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440.)

We independently apply the *BMW* guideposts to the facts to determine whether the award violates due process. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, 532 U.S. at pp. 439-440.) We defer, however, to the **[57]** express and implied factual findings of the jury, unless they are clearly erroneous. (*Id.* at p. 440, fn. 14.)[21]

The factor that provides the "'most important indicium of the reasonableness of a punitive damages award is the

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[21] Since we conduct an independent review, we need not reach asserted errors in instructing with regard to punitive damages, such as Philip Morris's contention that the trial court should have instructed the jury "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred," as later required by the Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422 (*State Farm*),which had not yet been decided at the time of trial. (See *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 754.) If Boeken rejects our reduction of the punitive damage award, as explained within, we have no reason to assume that the trial court will not follow *State Farm*.

degree of reprehensibility of the defendant's conduct.' [Citation.]" (*State Farm, supra*, 538 U.S. at p. 419, quoting *BMW, supra*, 517 U.S. at p. 575.) Several subsidiary factors guide the determination of the degree of reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm, supra*, 538 U.S. at p.419; *BMW, supra*, 517 U.S. at pp. 576-577.)

"The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to **[58]** achieve punishment or deterrence. [Citation.]" (*State Farm, supra*, 538 U.S. at p. 419.)

In this case, each factor weighs in favor of the jury's conclusion that punitive damages were appropriate. The evidence supports the conclusion that the harms caused to Boeken by Philip Morris's fraud and defective product were physical, not merely economic. And Philip Morris's conduct was repeated over a period of almost 50 years with an indifference to the health or safety of Boeken, a physically and psychologically vulnerable target.

The product was marketed knowing that it was a dangerous product — one that caused addiction and disease. Further, chemicals were added to the product to make it more addictive and easier to draw into the lungs, thus making it more dangerous. Boeken was drawn to the product at a young age, the Marlboro brand, with mislead-

ing advertising. He was kept smoking with misleading statements and falsehoods about smoking, disease, and addiction, the believability of which was enhanced by addiction; and Boeken's addiction was ensured when Marlboro's nicotine delivery was increased.

Boeken became financially vulnerable when he became unable to work after 1999. In the several years prior to 1999, his income had exceeded $200,000 per year.

Philip Morris contends that its fraud cannot be deemed reprehensible, because the health risks of smoking were public knowledge for decades; because the State of California protected cigarette companies from liability for the ten-year period of former Civil Code section 1714.45; and because its tortious conduct was **[59]** "remote," as shown by the trial court's instruction to the jury limiting liability for Philip Morris's fraudulent concealment to conduct that occurred prior to 1969.[22]

The health risks of smoking may have been public knowledge for decades, but given the evidence of the false controversy created by Philip Morris, the adulterations added to the cigarettes, and the fact that Boeken failed to understand and appreciate the risks of smoking, this argument fails.

Dr. Benowitz testified that most people who smoke ten or more cigarettes a day are addicted, and highly addicted smokers are those who smoke one pack or more of cigarettes per day. Boeken was smoking two packs a day by the time he was 14. Once addicted, smokers are particularly susceptible to misrepresentations and misleading statements such as those that comprised Philip Morris's campaign of doubt. He explained that non-suicidal, rational people use denial and rationalization to continue doing what is obviously or apparently

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[22] We do not reach Philip Morris's contention that the trial court was correct in limiting liability for fraudulent concealment to pre-1969 acts of concealment, since no issue has been raised by either party that would require us to do so.

harming them. Addiction interferes with the individual smoker's perception of the risk he is taking, and he will seize upon the evidence that appears to minimize the risk. Given a choice of conflicting opinions, an addict will choose the opinion that would support continued use. The evidence establishes that Philip Morris understood this weakness at least by 1959, used it to deceive, and kept its research on addiction secret.

In addition to fraud, the evidence establishes that Philip Morris acted with a conscious disregard of consumer health and safety in the manufacture and marketing of a dangerous product, and intentionally took advantage of the consumer expectation that "light" cigarettes were safer. **[60]**

Philip Morris knew that there was no reason to believe Marlboro Lights or Ultralights were any safer than its Reds.[23] Compensation has been described in scientific literature for 40 years, and Philip Morris's own research found no reduction in tar delivery for Marlboro Lights over regular cigarettes, but Philip Morris has only just recently initiated a study of human smokers to measure how much tar they actually take in. Although Philip Morris's laboratories were "state of the art," its studies of biological activity, using actual cigarettes that it markets, did not begin until 1999 or 2000.

Further demonstrating a conscious disregard for consumer safety, Philip Morris was *still* marketing "light" cigarettes at the time of trial, knowing that they may increase the risk of more serious cancers. And Philip Morris was still adding urea to Marlboro tobacco, causing more nicotine to be delivered more quickly to the smoker, as well as flavorings to create bronchodilators to open up the lungs.

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[23] It is not clear from the record whether Marlboro "Golds" and Marlboro "Lights" are two separate pack styles, or whether the parties simply used the terms interchangeably. There was test-imony stating that Marlboro "Golds" are "light" or "low-tar" cigarettes.

Dr. Farone testified that while he was employed by Philip Morris, he was made aware by Philip Morris's own internal documents that low-tar cigarettes were not lower in tar delivery, and were not any safer than regular cigarettes. Philip Morris knew that smokers sucked light cigarettes harder and took longer puffs. Nevertheless, Philip Morris did no testing of the relative carcinogenicity of regular and light cigarettes.

The Marlboro Lights or Ultralights smoked by Boeken resulted in adenocarcinoma of the lung,which spread to his brain and spine. Since 1959, it has been known that smoking is the cause in more than 90 percent of the cases of **[61]** this aggressive form of lung cancer. But the only biological testing of carcinogenicity conducted by Philip Morris was done in a secret lab out of the country, where a less carcinogenic Marlboro cigarette was developed in 1979, using reconstituted tobacco. It was never marketed, and senior Philip Morris's scientist, Dr. Osdene, received all reports from the secret lab at his home and destroyed them after reading them.

At the time of trial, about 16 million people in the United States smoked Marlboros. Most of these smokers believed that low-tar cigarettes were less hazardous. Indeed, Marlboro Golds outsell the Reds. There has, however, been an increase in lung adenocarcinoma, a more aggressive and fast-spreading cancer, and it is accepted among experts that the rise is attributable to low-tar cigarettes. Nevertheless, Philip Morris continued to market so-called light Marlboros.

We cannot agree with Philip Morris's suggestion that the ten-year immunity provided by section 1714.45 makes its conduct less reprehensible. Philip Morris adds urea to make Marlboros more addictive, and flavorings to make it easier for the smoke to reach the lungs. Section 1714.45, as we have discussed, provided immunity only for unadulterated tobacco products. (See *Naegele, supra*, 28 Cal.4th at pp. 864-865; *Myers, supra*, 28 Cal.4th at p. 837.)

Philip Morris contends that harm to others cannot be considered in a punitive damage analysis. In State Farm, the Supreme Court held that due process prohibits the imposition of punitive damages for unrelated unlawful acts committed outside of the State's jurisdiction, or acts that were lawful in the jurisdiction where they occurred. (*State Farm, supra*, 538 U.S. at pp.422-423.) The Court explained: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the **[62]** merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." (*Id.* at p.423.)

Similar out-of-state conduct may be relevant, however, to the issue of reprehensibility, when it demonstrates the deliberateness and culpability of the acts committed in the State where they are tortious, so long as the conduct has a "nexus to the specific harm suffered by the plaintiff."(*State Farm, supra*, 538 U.S. at p. 422.)

Philip Morris contends that its conduct in other states consisted solely of lawfully selling cigarettes, and that it was not shown to be similar to that which injured Boeken, because there was no evidence that it caused any injury to specific persons in other states. We find nothing in State Farm that requires proof of injury to specific persons other than the plaintiff, wherever they reside, when the conduct in question is identical; and we find that a sufficient nexus has been shown here with Philip Morris's conduct in the other states. The very conduct that injured Boeken, directed to all smokers in the United States, repeated over many years with knowledge of the risk to human life and health, is probative of intentional deceit; and the national marketing of a defective product, knowing that consumers expected it to be less hazardous, is probative of a willful and conscious disregard of the danger to human life. (See *State Farm, supra*, 538 U.S. at pp. 423-424.)

Having concluded there is sufficient evidence supporting all five reprehensibility factors, a substantial punitive damage award was justified. We turn to *BMW*'s remaining guideposts to determine independently whether the amount of punitive damages awarded was so excessive as to violate due process. (See *BMW, supra*, 517 U.S. at pp. 568, 574-575.)

The second and third *BMW* guideposts advise us to review "the disparity between the actual or potential harm suffered by the plaintiff and the punitive **[63]** damages award," and "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575.)[24]

Prior to its decision in State Farm, the United States Supreme Court held that a punitive damage award four times the compensatory damages and 200 times the out-of-pocket expenses to be, under the facts of that case, "close to the line." (*Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 23.) In *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, the Court held that a ratio of 10 times the potential harm to plaintiffs "was not so 'grossly excessive' as to violate due process," although it was 526 times greater than the actual damages awarded by the jury. (*TXO Production Corp. v. Alliance Resources Corp., supra*, 509 U.S. at p. 444; see also, *BMW, supra*, 517 U.S. at p. 582.) Here, the trial court's reduced award amounted to a ratio of approximately 18:1, punitive to compensatory damages.

In *State Farm*, the Supreme Court again refused, as it had in the past, "to impose a bright-line ratio which a punitive damages award cannot exceed"; and the Court observed that it had "'consistently rejected the notion that the constitutional line is marked by a simple mathemati-

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[24] The second criteria, being tied directly to the compensatory damages suffered by the plaintiff in the particular action, factors into the equation the Supreme Court's caveat that punishment for injury or harm to others not be included within the award.

cal formula, even one that compares actual and potential damages to the punitive award' [citation]." (*State Farm, supra*, 538 U.S. at pp. 424-425, quoting *BMW, supra*, 517 U.S. at p. 582.)

The Court went on, however, to *suggest* appropriate ratios, stating: "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, **[64]** in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. [Citation.] We cited that 4-to-1 ratio again in *Gore*. [Citation.] The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. [Citation.] While these ratios are not binding, they are instructive." (*State Farm, supra*, 538 U.S. at p. 425, citing *BMW, supra*, 517 U.S. at p. 581, and *Pacific Mutual Life Insurance Co. v. Haslip, supra*, 499 U.S. at pp. 23-24.)

Relying upon the Supreme Court's suggestion that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," (*State Farm, supra*, 538 U.S. at p. 425; see *BMW, supra*, 517 U.S. at p. 582), Philip Morris contends that the compensatory award of $5,539,127 was so substantial as to justify only a 1:1 ratio.

Philip Morris also relies upon the Supreme Court's warning that compensatory damages for emotional distress already contain a punitive element, which should not be duplicated in the punitive award. (*State Farm, supra*, 538 U.S. at p. 426.) Since Boeken's economist put his economic loss at more than $2 million, Philip Morris suggests that the remaining $3 million was compensation for emotional distress, also calling for a smaller ratio.

The Court's holding in *State Farm* was expressly based upon the fact that, in that case, "[t]he harm arose from a transaction in the economic realm, not from some

physical assault or trauma; there were no physical injuries." (*State Farm, supra*, 538 U.S. at p. 426.) And as the Supreme Court cautioned "[t]he precise award . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Id.* at p. 425.)

[65] Certainly, some of Boeken's noneconomic damages may have been intended to compensate him for his emotional distress, since he did suffer "excruciating psychological pain," particularly while waiting to know whether the cancer had spread to his lymph nodes. But the verdict did not specify how much, if any, of the noneconomic damages were meant to compensate Boeken for his emotional distress. And Philip Morris ignores the overwhelming evidence of *physical* harm that was not present in *State Farm*.

The physical harm to Boeken caused by Philip Morris's fraud and defective product consisted of a 40-year addiction to cigarettes, chronic bronchitis, and a particularly aggressive and fast-spreading form of lung cancer that causes death in virtually 100 percent of cases where the cancer spreads to lymph nodes. Boeken's cancer spread not only from his lung to his lymph nodes, but also to his brain and spine, making death a certainty. His chemotherapy and radiation therapy may have prolonged his life, but did not prevent death from the cancer caused by his smoking addition.

Before discovering that the cancer had spread to his lymph nodes, Boeken underwent extremely painful surgery to remove the upper part of his right lung, and to insert seven drains through extremely painful incisions. Radiation and chemotherapy resulted in neuropathy, jumpy muscles,numbness in his feet and hands, painful muscle cramps, sometimes lasting an entire day, a burning sensation in his feet, imbalance, hallucinations, insomnia, wasting, constant nausea, vomiting, the loss of his sense of taste and smell, and aching bones in his knees and hips, like being "hit . . . with a hammer." He suffered from an "explosive itch," his arms felt like "the

muscle [was] being stripped from the bone," and he suffered fungal growth in his esophagus that made it difficult to swallow.

In light of this evidence of physical injury, we cannot agree that the award was unusually large or that it must have consisted mostly of damages for emotional **[66]** distress. Thus, under the circumstances of this case, we cannot find that the compensatory award included a substantial punitive component requiring ratio of 1:1. (See *State Farm, supra*, 538 U.S. at p. 426.) This is particularly so in light of the potential harm in this case — death.

With regard to "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" (*State Farm, supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575), we note that the California Legislature has declared that "keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the *highest priorities* in disease prevention for the State of California." (Health & Saf.Code, §§ 118950, subd. (a)(11), 104350, subd. (a)(9), italics added.)[25]

California imposes civil fines for "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) A $2,500 civil penalty may be assessed for each violation. (Bus. & Prof.Code, § 17206, subd. (a).) Boeken smoked two and one-half packs of Marlboros per day for 43 years, approximately 40,000 packs, as a result of Philip Morris's fraud. If the sale of each pack were considered a violation, Philip Morris's fine might equal the $100 million in reduced punitive damages awarded by the trial court in this case.

We recognize that the record contains no evidence of typical fines for unlawful or unfair business practices, but

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[25] To this end, California imposes civil penalties on persons who furnish cigarettes to minors. (Bus. & Prof.Code, § 22958.) It is also a crime, and carries a possible fine of $1,000 per cigarette after the third offense. (Pen.Code, § 308, subd. (a).)

our discussion illustrates the propriety of a large multiplier within constitutional limits. In *State Farm*, the Supreme Court noted its reference in *BMW* to "a long legislative history, dating back over 700 [**67**] years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." (*State Farm, supra*, 538 U.S. at p. 425; citing *BMW, supra*, 517 U.S. at p. 581, and fn. 33.) Recognizing that history and applying State Farm's principles, one California court applied a ratio of nearly 4:1, which was, in its opinion, the outer constitutional limit for an unexceptional fraud case that caused only economic damages that were "neither exceptionally high nor low," and in which the fraudulent conduct was "neither exceptionally extreme nor trivial." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057.)

This case, by contrast, was exceptional, involving 40 years of fraud and the continuing marketing, with a conscious disregard of the danger to human life, of a product more dangerous than consumers expect. Further, although the compensatory damages were high, they were not exceptionally high, considering Boeken's former income and the pain he suffered. We conclude, therefore, that an appropriate ratio in this case may exceed 4:1.

In a recent product liability case involving a defective automobile occurring in a single model year, a California court applied a 5:1 ratio after an analysis of *State Farm's* requirements, choosing a multiplier greater than 4:1 due to the defendant's reckless disregard of consumers' safety and lives. (*Romo v. Ford Motor Co., supra*, 113 Cal.App.4th at pp. 755, 763.) The case involved a roll-over of a 1978 Ford Bronco resulting in the death of three occupants and personal injury to three other occupants. The Court of Appeal concluded that evidence of the reprehensibility of Ford's conduct was substantial: "As stated in our original opinion, not only did Ford 'willfully and consciously ignore[ ] the dangers to human life inherent in the 1978 Bronco as designed, resulting in the deaths of three persons' [citation], it also ignored its own internal safety

standards, created a false appearance of the presence of an integral roll-bar, and declined to test the strength **[68]** of the roof before placing it in production. [Citation.]" (*Romo v. Ford Motor Co., supra*, 113 Cal.App.4th at p. 755.) Under that analysis, and the facts presented here, 40 years of fraud and Philip Morris's *continuing* conscious disregard for the safety and lives of consumers of its "low-tar" Marlboros justify an even greater multiplier.

We must now determine whether the circumstances of this case set the stage for one of the "few awards exceeding a single-digit ratio between punitive and compensatory damages [that] will satisfy due process" and therefore justify the 18:1 ratio of the reduced award. (*State Farm, supra*, 538 U.S. at p. 425.)

The United States Supreme Court has recognized, and reaffirmed in State Farm, that states have "legitimate interests in punishing unlawful conduct and deterring its repetition,'" and that punitive damages may be properly imposed to further those interests. (*State Farm, supra*, 538 U.S. at p. 416, quoting *BMW, supra*, 517 U.S. at p. 568.)

Punitive damages are permitted by statute in California. (See Civ.Code, § 3294, subd.(a).) One of this state's principal purposes in permitting punitive damages is the deterrence of "'objectionable corporate policies'" when "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.]" (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 810 (*Grimshaw*); see *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820.)

"*Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles.*" (*Grimshaw, supra*, 119 Cal.App.3d at p. 810, 174 Cal.Rptr. 348, italics added.) A larger award may be necessary for this purpose, where reprehensible conduct has "exhibited a conscious and callous disregard of public safety in order to maximize corporate profits," and has **[69]** endangered the lives of thousands. (*Id.* at p. 819.) The California Supreme Court has repeatedly

pointed out that "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective. [Citations.]" (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

"[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.]" (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928.) "An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent. [Citation.]" (*Grimshaw, supra*, 119 Cal.App.3d at p. 820.)[26]

The United States Supreme Court has not stated that wealth cannot be considered in determining punitive damages. Rather, it explained: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant **[70]** who acts within its jurisdiction. [Citation.]" (*State Farm, supra*, 538 U.S. at p. 422.) But the wealth of a defendant may not otherwise justify a constitutionally excessive award. (*State Farm, supra*, 538 U.S. at p. 427.)

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[26] The most common measure of wealth for purposes of assess-ing punitive damages is net worth. (*See Storage Services v. Ooster-baan* (1989) 214 Cal.App.3d 498, 515.) Prior to *State Farm*, California courts routinely upheld punitive damage awards that amounted to a percentage of the defendant's net worth, from .05 percent in *Grimshaw, supra*, 119 Cal.App.3d at page 820, to 5 percent in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166, and not exceeding 10 percent. (*See Storage Services v. Oosterbaan, supra*, 214 Cal.App.3d at p. 515.) An award must not be disproportionate to the defendant's ability to pay, even if it is justified by the reprehensibility of the wrong and bears a reasonable relation to the harm it inflicted. (*Adams v. Murakami, supra*, 54 Cal.3d at p. 111.)

Nor has the Supreme Court rejected its earlier approbation of considering "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." (*Pacific Mutual Life Insurance Co. v. Haslip, supra*, 499 U.S. at p. 22.) And it reaffirmed in State Farm that since "'repeated misconduct is more reprehensible than an individual instance of malfeasance,'" "'a recidivist may be punished more severely than a first offender,'" so long as "the conduct in question replicates the prior transgressions." (*State Farm, supra*, 538 U.S. at p. 423, quoting *BMW, supra*, 517 U.S. at p. 577.) Thus, profit may increase the degree of reprehen-sibility, with the similar result of justifying a greater punitive damage award. (See *State Farm, supra*, 538 U.S. at pp. 422-424, 426-427.)

We conclude that, as we interpret *State Farm*, wealth and profits may serve to increase a punitive damage award, but only to the extent that they were derived from the wrongful conduct that harmed the plaintiff or similar continuing conduct toward others, including such conduct in another state, so long as it is wrongful in the other state, thus demonstrating recidivist conduct and greater reprehensibility. (See *State Farm, supra*, 538 U.S. at pp. 422-424, 426-427.)

Here, there was evidence that, based upon its share of the domestic market, the net worth of Philip Morris USA at the time of trial was $75 billion, and that its cigarette profits were $14.7 million per day. Those figures, however, were based upon nationwide sales of all its cigarette brands, including lawful sales not procured by fraud, and including regular, as well as "light" cigarettes. We find no **[71]** evidence in the record of Philip Morris's profits with regard to Marlboros during the time of its fraud, or its profits with regard to Marlboro Golds, Lights, or Ultra-lights, or of the contribution of those profits to its present wealth. Thus, we perceive the evidence of wealth and profits insufficient to justify an increase in punitive damages above a single digit ratio.

We are satisfied that the reprehensible conduct established by the evidence, repeated over four decades, and resulting in the death of Boeken, justifies the highest single digit ratio that will satisfy due process while furthering California's policy of punishment and deterrence. (See *State Farm, supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575.)

Philip Morris contends that since other California juries have returned verdicts including substantial punitive damages for the same conduct, there is less need to further the state's interest in deterrence by imposing a higher multiplier. We agree that punitive damages previously imposed for the same conduct in another case, as well as possible future awards, are relevant in determining the amount of punitive damages required to sufficiently punish and deter. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661.)

In support of this point, however, Philip Morris refers to the judgments in two cases that are not final. One has been reversed by the court of appeal, and in the other, review has been dismissed and the Remittitur has not yet been filed.[27] Further, in its one-paragraph argument on this point, Philip Morris makes no attempt to show that the facts justifying the punitive damage award were the same **[72]** in both cases. Potential future awards in cases not shown to have identical issues are given little weight. (*Stevens v. Owens-Corning Fiberglas Corp., supra*, 49 Cal.App.4th at p. 1661.)

Philip Morris contends that the state's interest in deterring future wrongs is satisfied by the 1998 Master Settlement Agreement (MSA) between Philip Morris and other tobacco companies and the states, including

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[27] See e.g., *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App. 4th 635, modified and rehearing denied April 29, 2004; *Henley v. Philip Morris, Inc.*, No. S123023, review dismissed September 15, 2004, formerly published at 114 Cal.App.4th 1429; see now, 9 Cal.Rptr.3d 29.

California.[28] Philip Morris contends that the MSA requires it to pay $20.5 billion to the State of California over a number of years, beginning in 2000 and ending in 2025, and that such sum is designed to deter Philip Morris from engaging in the same conduct upon which the punitive damage award is based in this case.

In particular, Philip Morris points out, the MSA prohibits youth targeting, bans virtually all outdoor and transit advertising, prohibits any agreement to limit or suppress research on the health effects of smoking, and requires the dissolution of the Tobacco Institute and the Council for Tobacco Research.

The purpose of the lawsuits underlying the MSA was to recover the states' costs of providing health care to persons with smoking-related illnesses. (*A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.* (2001 3d Cir.) 263 F.3d 239, 241.) The billions of dollars to be paid over the years by the signatory tobacco companies are intended to pay such claims, and to fund measures aimed at reducing underage smoking. (Health & Saf.Code, §§ 104555-104557; see *PTI, Inc. v. Philip Morris Inc.* (C.D.Cal.2000) 100 F.Supp.2d 1179, 1185.)

We note that Philip Morris has referred to no evidence in the record or judicially noticed to support its claim that its share of the payments under the MSA will amount to $20.5 billion in the period ending 2025. For proof of this assertion, **[73]** Philip Morris refers only to argument in its memorandum of points and authorities in support of its motion for new trial. This is not evidence. (See *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090.)

The MSA requires payments from all tobacco companies participating in the settlement, according to their relative market shares. "Market share" is defined by the MSA as a percentage of the total number of cigarettes sold in the 50 United States. "Relative market share" refers to

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[28] See the MSA online at http://caag.state.ca.us/tobacco/pdf/1msa.pdf.

a percentage of the total number of cigarettes shipped in or to the 50 United States. Since 1998, Philip Morris has sold fewer cigarettes, which may have reduced its market share. But since there is no evidence in the record of the number of cigarettes sold or shipped by Philip Morris and the other participating tobacco companies, we cannot determine its market share or relative market share, and Philip Morris's figure of $20.5 billion remains just argument.[29]

Philip Morris has not shown from the provisions of the MSA that its purpose is punitive, rather than compensatory, relying instead upon the comments of a Florida court to that effect. (See e.g., *Liggett Group Inc. v. Engle* (Fla.App. 3 Dist.2003) 853 So.2d 434, 469, review granted.) Our review of the MSA reveals no provision prohibiting the participating tobacco companies from raising prices to pay the sums called for in the agreement. Since 1998, although Philip Morris has sold fewer cigarettes, it has increased its prices, with the result that revenues were up 47.99 percent in 2000. Thus, there may be no punitive or deterrent effect as a result of the payments required under the MSA, since Philip Morris may simply absorb the cost by raising prices without any competitive disadvantage, because the other participants are likely to do the same. (See *Grimshaw, supra*, 119 **[74]** Cal.App.3d at p. 820; cf., *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 929, fn. 14.)

We agree, however, that the MSA does provide Philip Morris with an incentive not to misrepresent the health risks of its products, and not to target underage smokers with its misrepresentations, since it prohibits it from doing so. On the other hand, it does not punish Philip Morris for its harm to Boeken. It does not deter Philip Morris from adding flavorings and chemicals that make its product more addictive. It does nothing to deter Philip

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[29] The MSA provides for calculation of shares by an independent auditor.

Morris from marketing defective "light" cigarettes, knowing that they are more dangerous than the ordinary consumer expects.

In light of our due process analysis under State Farm, we shall order a new trial on punitive damages, unless plaintiff agrees to a reduction of the judgment to reflect a punitive damage award of approximately nine times the compensatory award, the sum of $50 million. Since we have determined that the record does not support a greater award that would satisfy the requirements of due process under the United States Constitution, we need not reach Boeken's claim on cross-appeal that the original award of $3 billion is not excessive under California law. For the same reason, we need not reach Philip Morris's contention that it was the result of passion and prejudice.[39]

DISPOSITION

The judgment is affirmed in all respects except the amount of punitive damages. The judgment is modified to reduce the punitive damage award to $50 million, provided Boeken files a timely consent to such reduction in accordance with rule 24(d), California Rules of Court. If no such consent is filed within the time allowed, the judgment is reversed with regard to the amount of

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[39] This includes Philip Morris's complaint that in closing argument, Boeken's counsel committed misconduct by engaging in name-calling and inflammatory analogies, resulting in a punitive award based upon emotion and prejudice. Any prejudice had already dissipated prior to judgment due to the trial court's $2.9 billion reduction in the award. In any event, since Philip Morris admits that it did not object to any but one of the remarks, and does not claim to have asked that the jury be admonished, it has forfeited any claim of misconduct. (See *Sabella v. Southern Pac. Co., supra*, 70 Cal.2d at p. 318.) And Boeken denies misconduct, pointing out that the remarks were made in relation to negative comments about Philip Morris by others, as described by Philip **[75]** Morris's own witnesses. If the issue of punitive damages is retried, Philip Morris will have the opportunity to object and show otherwise.

punitive damages only, and remanded for a new trial solely upon that issue. Both sides are to bear their own costs.

CERTIFIED FOR PUBLICATION

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

APPENDIX D

[CT 14810]

FILED
AUG 9, 2001

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

RICHARD BOEKEN,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	BC 226593
	)	
PHILIP MORRIS	)	
INCORPORATED, et al.,	)	
	)	
Defendants.	)	

STATEMENT OF DECISION RE:
DEFENDANT'S MOTIONS FOR
(1) NEW TRIAL, AND (2) JUDGMENT
NOTWITHSTANDING THE VERDICT

I.

BACKGROUND

Trial in this action, brought by plaintiff Richard Boeken (Boeken) against defendant Philip Morris Incorporated (Philip Morris), commenced before a jury on March 19, 2001 and concluded on June 6, 2001 when the jury returned a verdict of $5,539,127 in compensatory damages and $3 billion in punitive damages. Philip Morris now moves for a new trial under CCP § 657 and, alternatively, for judgment notwithstanding the verdict pursuant to CCP § 629.

[CT 14811]

II.

MOTION FOR A NEW TRIAL

1. Punitive Damages.

Trial courts must, under California law, remit and/or grant motions for new trials in punitive damage cases where the amount of a jury award is excessive as a matter of law. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910. Trial courts sit "not in an appellate capacity but as an independent trier of fact" when evaluating claims that punitive damage awards are excessive. *Id.* at 933. If the entire record, including reasonable inferences therefrom, reveals an excessive award, trial courts have a "duty to grant a new trial." *Tice v. Kaiser Co.* (1951) 102 Cal.App.2d 44, 46.

To determine whether a punitive damage award satisfies California's legal requirements, this Court must evaluate three primary factors: (1) the relationship between punitive and compensatory damages awarded to the particular plaintiff; (2) defendant's financial condition; and (3) the degree of reprehensibility of defendant's conduct. *Neal*, 21 Cal.3d at 928; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110.

The jury instruction given here, BAJI 14.71, accurately and succinctly characterizes California law, and states in part:

> In arriving at any award of punitive damages, you are to consider the following: (1) The reprehensibility of the conduct of the defendant. (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition. (3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered

by the plaintiff.

The U.S. Constitution further requires trial court examination of allegedly excessive punitive
[CT 14812] verdicts to insure they comply with due process requirements. *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568. As with state law, a California trial court must conduct "an independent examination of the relevant criteria" in assessing compliance with federal due process. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.* (U.S. 2001) 121 S. Ct. 1678, 1685. Federal due process review of punitive damage awards reaches beyond simply examining a jury verdict to determine whether a rational basis exists to justify it. *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 456 (rejecting the rational basis test).[1]

Federal due process requires that a punitive damage award possess "a reasonable relationship to compensatory damages" awarded to a particular plaintiff *BMW*, 517 U.S. at 580. Courts must test the reasonableness of that relationship using three non-exclusive guideposts established by the *BMW* court. They are: (1) the degree of reprehensibility of defendant's conduct; (2) the relationship between punitive and compensatory damages awarded to the particular plaintiff; and (3) the civil and criminal penalties that could be imposed for comparable misconduct. *Id.* at 575-85.

A. Reprehensibility of Defendant's Conduct.

The jury plainly, and with substantial evidentiary support, found Philip Morris's conduct reprehensible. The record fully supports findings that Philip Morris knew by the late 1950s and early 1960s that the nicotine in

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[1] The United States Supreme Court did not rule in *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415 that a rational basis test is the constitutional standard of review.

cigarettes is highly addictive, that substances in cigarette tar cause lung cancer, and that no substantial medical or scientific doubt existed on these crucial facts. Nevertheless, motivated primarily by a professed desire to generate wealth, Philip Morris, in concert with other major American tobacco companies, consistently endeavored through calculated **[CT14813]** misrepresentations to create doubts in the minds of smokers, especially addicted smokers such as Richard Boeken, that cigarettes are neither addictive nor disease-producing. In the language of a key internal document revealing the plan, Philip Morris and other tobacco companies set out to "create doubt about the health charge without actually denying it."

The evidence supports a finding that in 1954 Philip Morris promised in a public announcement run in over 400 newspapers nationwide to pursue objective research into the health risks of smoking and to release the results for the benefit of consumers. But, to the contrary, Philip Morris privately constrained research to produce results casting doubt on the alleged risks of smoking and went to extraordinary lengths to hide its own scientific information showing the company was fully aware of the true health dangers. One revealing memo written to the Company's top research scientist disclosed a practice of "burying" adverse internal research results ("[if the study proves nicotine is addictive] we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.")

The record adequately demonstrates for purposes of this motion that Philip Morris publicly and falsely represented that: no proof existed that smoking causes cancer, knowing the opposite was true; that authorities have reached no agreement on what causes lung cancer, knowing the opposite was true; and that smoking is not addictive, knowing the opposite was true. While Philip Morris claims to have been relying on certain technical definitions of the language it used, substantial evidence was presented at trial showing that Philip Morris intended its publicly and widely disseminated words to be under-

stood in a non-technical sense, communicating a false impression that the nicotine in cigarettes is not in fact addictive and that cigarette tars do not in fact cause cancer. **[CT14814]**

Information, widely disseminated by sources other than Philip Morris, revealed the true health risks of cigarettes. Nevertheless, in light of all the evidence presented, it appears that Phillip Morris's doubt-creating scheme fully succeeded in the case of Mr. Boeken and others addicted to the nicotine in cigarettes. Nationally renown[ed] experts on smoking and health testified that addicts, such as Richard Boeken, predictably search for reasons to continue their drug consumption. Substantial evidence was presented demonstrating that Philip Morris seized on the opportunity presented by this predictable addictive behavior and provided the sought-after, albeit false, reasons in the form of statements calculated to create false doubt. This concerted effort to create doubt with misinformation was initiated long before the federal government enacted labeling statutes and was carried out for decades thereafter up through the late 1990s, coinciding almost exactly with Mr. Boeken's lifetime.

Substantial evidence supports a finding that Philip Morris was aware people who do not begin smoking in their adolescence are unlikely to become heavily addicted, life-long smokers. Most people who are mature enough to understand the risks involved, and who are not already addicted, do not begin smoking. Substantial evidence further supports a finding that, with this in mind, Philip Morris focused its marketing on children, including the adolescent Richard Boeken in the 1950s, placing advertising where children were most likely to see it and crafting ads appealing to youthful passions for feelings of independence, identity and acceptance.

An internal Philip Morris document describes a strategy of targeting minors to produce "a rapidly increasing pool of teenagers from which to replace smokers lost through normal attrition." The evidence supports a finding that the pool Philip Morris had in mind included the

under-age Richard Boeken, who became fully addicted to smoking before reaching his 18th birthday. The **[CT14815]** evidence further indicates that Philip Morris monitored the relative market share of its Marlboro brand — the brand smoked by Boeken from his teens — to insure it maintained dominance among underage smokers to whom cigarettes could not be sold legally.

Evidence indicating a nationwide pattern of deceit involving millions of American consumers was properly admitted at trial. Proof "of a nationwide pattern of tortious conduct" is specifically admissible to show reprehensibility. *BMW*, 517 U.S. at 576-77 (*citing TXO*, 509 U.S. at 462 n.28, rejecting *TXO*'s objection to the admission of its alleged wrongdoing in other parts of the country and stating "[u]nder well-settled law, . . . factors such as these are typically considered in assessing punitive damages.")[2]

Philip Morris urges the Court to conclude, as a matter of law, that its actions were not reprehensible in light of certain cigarette-related California and federal statutes. Citing the Public Health Cigarette Act of 1969, 15 U.S.C. §§ 1331 *et seq.*, Philip Morris argues that Congress has determined "that it is not reprehensible . . . to market and advertise cigarettes with the warning prescribed in that statute." Philip Morris is not being punished for marketing cigarettes, but rather for engaging in a fraudulent business scheme initiated long before passage of the Act. The Act left open the power of states to punish defendants for conduct of the sort proved here. *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 538-40.

California Civil Code § 1714.45 (enacted in 1987 and repealed 1998) does not evidence a legislative determination that conduct of the sort in evidence here is not reprehensible as a matter of law. On the contrary,

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[2] Philip Morris did not object at trial to the admission of out-of-state information. It did move *in limine* to exclude evidence of alleged wrongdoing occurring in other countries, and that motion was granted and consistently enforced throughout the trial.

circumstances surrounding repeal of § 1714.45 suggest some, if not a **[CT14816]** majority, of California's legislators in 1998 were deeply disturbed by revelations flowing from ongoing investigations of Philip Morris.[3]

Exercising its independent judgment, the Court finds the preceding facts, supported by substantial evidence, true for the purposes of assessing the reasonableness of the jury's punitive damages award. Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral.

B. Relationship Between Punitive and Compensatory Damages Awarded to the Particular Plaintiff.

California law focuses on the necessity to punish the particular wrongdoer in determining the amount of a legally appropriate punitive-to-compensatory ratio. *See, e.g., Neal*, 21 Cal.3d at 928 & n.13. While deterring others is a legitimate function of punitive damages, and BAJI 14.71 instructs juries to award punitive damages "for the sake of example," the quantum selected must be assessed in relation to the defendant and only its wrongdoing. The law expects that in appropriately punishing the particular wrongdoer, the wrongdoer and others will be deterred from engaging in the same or similar conduct. The law does not, however, authorize punitive damage theories attempting to punish one wrongdoer for the conduct of others in order to deter those others from future misconduct. As indicated by the California Supreme Court, "the quintessence of punitive damages is to deter future misconduct by the defendant." *Adams v. Murakami* (1991) 54 Cal.3d 105, 110. Consequently, BAJI 14.71 specifically instructs fact-finders to consider "the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition."
[CT14817]

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[3] *See*, discussion of Legislative intent at p. 23 [App. 170a], *infra*.

California law focuses on the actual harm suffered by the plaintiff in determining the denominator of the relational analysis. *See e.g., Neal, supra.* BAJI 14.71 instructs fact-finders to consider "the injury, harm or damage actually suffered by the plaintiff" in arriving at a reasonable punitive-to-compensatory ratio.[4] Plaintiff here urges the Court to consider values, outside the evidence, relating to the potential harm to others in assessing the appropriate punitive damage denominator. The Court, however, must consider only the ratio between punitive damages and injuries suffered by the plaintiff, not other persons. Plaintiff incorrectly urges the Court to characterize the resultant ratio as 3-to-10, based on unlitigated assumptions as to how many Californians may in the future sue Philip Morris and what their individual recoveries might theoretically be. Such an approach is not authorized by existing case law.

No exact mathematical ratio exists giving courts a bright line in deciding when the punitive-to-compensatory damages relationship becomes excessive as a matter of law. Indeed, the United States Supreme Court in *BMW* warned against any "categorical approach" to ratios, noting that it had "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . ." *BMW*, 517 U.S. at 582. *See also, Finney v. Lockhart* (1950) 35 Cal.2d 161, 164 ("[T]here is no fixed ratio . . .").

Here, the jury settled on figures producing a 540-to-1 ratio. Such a ratio is not unprecedented. *See e.g., TXO Prod. Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443

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[4] The Court rejected a Philip Morris drafted instruction direct-ing the jury to ignore all harm done by defendant to persons other than Mr. Boeken, regardless of where they lived. BAJI 14.71 precisely covers the matter in connection with determining an appropriate punitive to-compensatory ratio ("the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff") and correctly does not apply a "plaintiff only" limitation on the question of reprehensibility.

[CT 14818] (upholding a $10 million award with a 526-to-1 ratio). On the other hand, in a purely economic damages case, the *BMW* court cautioned that a ratio in the 500-to-1 range should "raise a suspicious judicial eyebrow." *BMW*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481, O'Connor, J., dissenting). In an intentional fraud case, the United States Supreme Court has deemed a ratio of 4-to-1 "close to the [constitutional] line." *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24.

Plaintiff lists a string of cases in which California courts have let stand punitive damages awards substantially exceeding a 4-to-1 ratio.[5] Philip Morris correctly observes that none of these cases involved compensatory awards in the range of $5 million, and argues that the amount of the compensatory award, if high, must, as a matter of law, operate to independently reduce the potential size of any punitive damage award, pointing out that no California appellate court in any published opinion has ever upheld a ratio of greater than 3-to-1 when the compensatory award was more than $1 million. In the end, this argument leads to the unsupportable proposition that those who commit the most devastating and reprehensible wrongs are given caps on their punitive damages exposure which those who commit lesser wrongs do not receive — a proposition standing the legitimate and necessary role of punitive damages on its head. While no reported case with compensatory damages exceeding $1 million exceeds a ratio of 3-to-1, that does not mean that 3-to-1 establishes a bright line beyond which no jury must go in California, especially in cases where a defendant's conduct is so utterly reprehensible, and has such devastating and widespread consequences, as here presented. **[CT 14819]**

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[5] *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910 (78-to-1); *Finney v. Lockhart* (1950) 35 Cal.2d 161 (2000-to-1); *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610 (83-to-1); *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal.App.3d 266 (190-to-1).

C. Defendant's Financial Condition.

Philip Morris offered no evidence of its financial condition and rested entirely on the state of plaintiff's evidence. Plaintiff's expert economist, Robert Johnson, testified essentially unrebutted, that Philip Morris's domestic tobacco company has a value of between $30 and $35 billion. The worth of the company's domestic operation is not reported separately in the parent company's annual report and must be broken out using estimations involving income and revenue. California law permits using defendant's wealth, income, or both to estimate financial condition. *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d451; *Wetherbee v. United States Ins. Co. of America* (1971) 18 Cal.App.3d 266. A strict accountant's "assets vs. liabilities" calculation is not required, and Philip Morris offered no expert testimony at trial rebutting the validity of the methodology used by Mr. Johnson.

While Robert Johnson offered evidence indicating a potential value exceeding $35 billion, ample evidence, uncontradicted by credible contra evidence, exists on the record to support a finding that defendant's current worth at the time of trial was between $30 and $35 billion. Exercising its independent judgment, the Court finds this fact true for the purposes of assessing the reasonableness of the jury's punitive damages award.

Plaintiff suggests, and the Court agrees, that California cases tend to limit punitive damages awards to sums generally in a range under 10% of a defendant's total worth. *See, Goshgarian v. George* (1984) 161 Cal.App.3d 1214, 1228. As with punitive-to-compensatory ratios, this figure is not a matter of mathematical certainty or invariant. *See, Villabona v. Springer* (1996) 43 Cal.App.4th 1525,1539-41 (upholding 23.1 %); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 391-92 (upholding 1[illegible]5 %). The jury's award here is within the percentage **[CT 14320]** of worth guideline generally allowed by California law.

D. Civil and Criminal Penalties That Could Be Imposed for Comparable Misconduct.

Finding analogous penalty provisions sanctioning frauds leading to wrongful death is a difficult, if not impossible, undertaking. Plaintiff points to the California Unfair Competition Act proscribing "any unlawful, unfair or fraudulent business act or practice . . ." Cal. Bus. & Prof. Code § 17200. Using the potential multiples achievable for discrete antitrust violations prescribed by the California Unfair Trade Practices Act, a different law, plaintiff attempts an analogy assuming the sale of each pack of cigarettes as a single violation, leading to staggering potential fines at $1000 per sale. Plaintiff also cites Penal Code provisions purporting to permit fines of $10,000 for each violation, and separate provisions allowing courts to fine employees individually for their misconduct. Philip Morris offers no analogies other than to criticize those proposed by plaintiff.

The Court has not on its own found any convincing analogous civil or criminal penalties that could be imposed for comparable misconduct, and considers this factor relatively neutral in assessing the reasonableness of the jury's punitive damages award here.

E. Deterrence of Future Conduct.

Citing details of the Master Settlement Agreement with the state Attorneys General and the company's very recent, and admittedly belated, public confession that the nicotine in cigarettes is addictive and that tars in cigarettes cause lung cancer, Philip Morris argues punishment is inappropriate here because there is no possible future conduct requiring deterrence. Philip Morris had a full opportunity to present the precise details of the Master Settlement Agreement (MSA) to the jury in mitigation of, or as an argument against, punitive damages. While that agreement does **[CT14821]** prohibit much of the misconduct at issue here, it by no means

guarantees that Philip Morris will now become the model corporate citizen which it now claims to be.

Effective deterrence involves more than just prohibiting conduct, and requires changing mindsets. Philip Morris has, in the past, demonstrated a willingness and ability to achieve its ends by creative means, and the Court cannot predict what those means might in the future be for a corporation with enormous resources profiting from the sale of a life threatening product. Philip Morris can, of course, continue to lawfully sell its product, but it must do so with a mindset far different from that evidenced by its corporate history to date. Such a sea change may have begun to occur at Philip Morris, but, in the exercise of independent judgment in light of all the evidence at trial, the Court finds that deterrence in the form of substantial punitive damages is both necessary and proper to prevent Philip Morris's return to the old mindset or its crafting of ever-more ingenious ways to generate wealth through tortious means.

F. Potential for Future Punitive Damages Awards.

Philip Morris correctly argues that "[t]he likelihood of future damage awards may also be considered" in assessing the reasonableness of a punitive damages award. *Stevens v. Ownes-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661. Given the evidence presented at trial here, and the fact that Philip Morris refused to accept even a scintilla of responsibility for the harm it has done to Richard Boeken and other similarly situated consumers of its products, the Court does not doubt that Philip Morris will continue to incur large punitive damages awards in California and elsewhere. Given the law that a party is fully liable for injuries to another when that party's tortious misconduct constitutes a substantial contributing factor to the injury suffered, it appears highly likely that future juries will continue to hold Philip Morris liable for large compensatory awards, ev[illegible] **[CT14822]** when they believe the plaintiff's conduct (choice to smoke)

also constitutes a substantial factor contributing to the injuries. In this setting, when Philip Morris refuses to accept any responsibility, moral or otherwise, it is easy to see how juries will predictably find the company deserving of substantial punishment.[6]

If Philip Morris continues to make the argument, attempted with this jury, that even though its highest executives may have lied to the American public about the risks of cigarettes, it bears absolutely no moral or legal responsibility for the deaths of people who consumed its products, because every consumer should have known from the outset that the executives were not truthful, then, in this Court's view based on the evidence examined through weeks of trial, Philip Morris is entirely correct that it will continue to incur substantial future compensatory and punitive damage awards by other juries.

This Court takes into consideration the potential for future damage awards in its ultimate decision here, but with the caveat that it cannot speculate at the amounts or number of such awards and cannot rely on such predictions in reaching a final punitive damage result.

After balancing all the relevant considerations, the Court finds that the jury's punitive damage award was legally excessive because it produced an excessive punitive-to-compensatory ratio. While the Court cannot know with certainty what ratio is exactly correct, it finds that a ratio of approximately 20-to-1 is appropriate in this particular circumstance. No party disputes the rationality of the jury's compensatory award of $5,539,127, and the Court, exercising its **[CT14823]** independent, judgment determines from all the evidence that a punitive award of S 100 million is a reasonable sum to be awarded against

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[6] In the present case, Philip Morris elected not to bifurcate the punitive damages portion of the case. That choice, which it freely made, while not giving the jury a feared "two bites at the apple," deprived the company of the traditional opportunity to acknowledge responsibility after liability had been determined but before the jury had assessed punitive damages.

Philip Morris in these circumstances.

2. Plaintiffs' Causes of Action.

A. Scope of Preemption.

The only claims to which preemption applies involve post-1969 failures to warn through advertising and promotional activities. The Court specifically instructed the jury not to consider such claims for any conduct occurring after July 1, 1969, the effective date of the Federal Cigarette Labeling Act (FCLAA) 15 U.S.C. §§ 1331, *et seq.* The FCLAA does not preempt any claims submitted to the jury here.

The United States Supreme Court in *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504 expressly rejected the implied preemption theory which defendant advanced from the outset of this case. This Court denied motions *in limine* on the preemption assertions now advanced, and the Court again denies them for the reasons stated in its written *in limine* decision.

Specifically, *Cipolone* does not bar post-1969 claims that Philip Morris committed affirmative fraud by making knowingly false statements, whether in advertisements, promotions, or elsewhere. The Court in *Cipollone* held that the FCLAA preempts post-1969 failure to warn claims: (1) that a manufacturer should have included additional, or more clearly stated, warnings; (2) that cigarette advertising and promotions which, though not false, neutralized federally mandated warning labels; or (3) that cigarette advertisements or promotions concealed material facts. *Cipollone*, 505 U.S. at 524, 527-28. Claims such as tried here, including affirmative fraud, are not preempted — a result not altered by the United States Supreme Court's recent decision in *Lorillard Tobacco Co. v. Reilly* (2001) 121 S. Ct. 2404.

[CT14824]

All the evidence admitted at trial was relevant to non-preempted claims. Defendant has not cited one

instance in which objected-to but admitted evidence related only to a preempted claim.

B. Reliance.

Plaintiff tried this case on a theory of indirect reliance. One who makes false representations need not have a particular victim in mind. *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092. Fraudulent advertising, as an example, is actionable on a theory of indirect reliance. *See e.g., Committee on Children's Television, Inc. v. General Foods* (1983) 35 Cal.3d 197.

Plaintiff did not need to prove that he remembered actually seeing or hearing Philip Morris's false statements. Reliance may be inferred here from the conduct and beliefs of Mr. Boeken consistent with his reliance on Philip Morris's false, doubt-creating statements, including those made by others acting in concert with Philip Morris, the exact content of which Boeken cannot now recall. As the California Supreme Court stated in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814, reliance "may be inferred from the circumstances," which may provide "much stronger and more satisfactory evidence" of reliance than "direct testimony to the same effect." An "inference of reliance arises" when the plaintiff's actions, as here, were "consistent with reliance on the representation." *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363. This result is not inconsistent with *Mirkin* because reliance is not presumed but rather inferred from circumstantial evidence, in the same way facts are inferred circumstantially in other cases. The fact of reliance may be inferred circumstantially from the widespread nature, and false content, of the representations and Mr. Boeken's behavior and beliefs consistent with them.

The cumulative impact of mass disseminated misrepresentations in cases such as here presented permits a circumstantial inference (as distinguished from a presumption) of reliance. **[CT14825]** *Children's Television*, 35 Cal.3d at 218-19 (where an inference of reliance was

permitted from false statements regarding sugared cereals even though the children involved could not recall the specific false statements). While the California Supreme Court in *Mirkin* distinguished *Vasquez* and *Occidental Land*, it did not reject the traditional availability of inferred reliance. Moreover, *Mirkin* did not render Children's Advertising inapposite. *Mirkin* disallowed a claim by plaintiffs who said they had generally relied on the integrity of the stock market but, unlike Boeken, did not hear any misrepresentations, either directly or indirectly, to justify that reliance.

While Philip Morris may be correct that fraud claims in California cannot rest solely on visual images, *Maneely v. General Motors Corp.* (9th Cir. 1977) 108 F.3d 1176, 1181, Boeken's claims rest on misinformation which Philip Morris's own documents, and the documents of those acting in concert with Philip Morris, say was widely and purposefully communicated over a period of decades to consumers and the public at large to the effect, among other things, that, in Richard Boeken's words, "tobacco is not harmful" and "there is no good proof or scientific fact that it causes cancer . . ."

The record contains adequate evidence from which a circumstantial inference can reasonably be drawn that Mr. Boeken relied on Philip Morris's misrepresentations forming the basis of the fraud claims here. The Court, exercising its independent judgment, finds it true for the purposes of deciding this motion.

C. Evidence of Felony Convictions.

The Court exercised its discretion to exclude Mr. Boeken's felony convictions under Evidence Code § 352 on grounds that their prejudicial effect outweighed their probative value. Plaintiff's cancer is not related to any prior convictions. He did not serve time for any conviction.**[CT14826]** The convictions were remote in time, with the most recent occurring 14 years ago.

While Mr. Boeken's credibility was in issue, the Court believed that a probability of undue prejudice existed and that a limiting instruction would most likely not have cured it. The Court, in its discretion, decided against taking the risk in view of the remoteness of the convictions.

D. Strict Products Liability and Negligence.

Plaintiff's experts testified that there were reasonable alternative cigarette designs that would have been safer and that would have reduced the risks. The products liability instructions given repeatedly referred to risks and benefits inherent in the *design* itself, as distinguished from the product itself. It is sufficient for plaintiff to demonstrate the existence of a safer cigarette design or that the risk of harm could have been reduced. Restatement of Law Third, Torts: Products Liability § 2. The jury assessed the experts' credibility and their testimony was not so far out of reasonable bounds that this Court should, in exercising its independent judgment, disturb the verdict by granting Philip Morris a new trial.

E. Excusing Juror No. 5.

The Court finds that it properly excused Juror No. 5 for the reasons stated in its Statement of Decision prepared and sealed concurrently with the action taken during trial.

F. Passion and Prejudice.

Philip Morris seeks to set aside the entire verdict on grounds that plaintiff's counsel engaged in misconduct so pervasive that it prejudiced the jury to a degree such that defendant could not receive a fair trial. This trial was hard and fairly fought by counsel on both sides, with the parties well represented at every turn by exemplary lawyers who consistently adhered the highest standards

of courtroom conduct and civility. On rare occasion, counsel on both sides made statements in front **[CT14827]** of the jury warranting objections that were made and sustained. The jury understood they were to disregard statements of counsel to which objections were sustained.

Relations of counsel with the jury and Court were such that neither side exhibited, or communicated privately to the Court, any fear of rising to make meritorious objections. Counsel were well aware that the Court would listen in chambers to any reasonable complaints they might have concerning the conduct of opposing counsel.

If, as Philip Morris now asserts for the purposes of this motion, plaintiff's counsel engaged in a sustained pattern of misconduct so egregious that it threatened to deprive defendant of a fair trial, Philip Morris could have, and should have, raised the issue during trial outside the presence of the jury. The Court was ready and willing to sustain objections to particular questions, statements, or arguments of counsel, and did so whenever an appropriate objection was stated. When such objections were sustained, as they were on occasion, counsel on both sides immediately and courteously rephrased or abandoned the point.

In these circumstances, failure to object constitutes a waiver by highly competent and effective counsel of the grounds now asserted for a new trial. None of the cited instances of alleged misconduct by plaintiff's counsel were so egregious standing alone or together that they could not have been cured by an appropriate limiting instruction which the Court would have given if properly requested.

The second portion of defendant's motion for a new trial relating to matters other than punitive damages is denied in its entirety. **[CT14828]**

III.

JUDGMENT NOTWITHSTANDING THE VERDICT

Philip Morris moves for judgment notwithstanding the verdict on grounds which, in many ways, overlap those stated in its motion for a new trial. Here the trial court must not reweigh the evidence or judge the credibility of witnesses. A judgment notwithstanding the verdict may be granted only if it appears from all the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion must be denied. *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510.

A. Misrepresentation.

Philip Morris urges the Court to enter judgment notwithstanding the verdict on grounds that plaintiff failed to prove that Mr. Boeken ever saw or heard any actionable misrepresentation. As discussed previously, Boeken may prove his case based on a theory in indirect and inferred reliance. Richard Boeken testified that in the 1960s he received misinformation of the nature shown to have been disseminated by Philip Morris, in concert with other members of the tobacco industry and their agents, to the effect that, in Mr. Boeken's words, "tobacco is not harmful" and that "there is no good proof or scientific fact that it causes cancer . . ." Boeken further recalled that in the 1970s he had an understanding that the tobacco industry, including Philip Morris, "disagreed that their product was harmful." Boeken testified, and the jury must have believed, that he trusted and relied on what he heard.

Under the evidence presented, a trier of fact could reasonably infer circumstantially that Philip Morris and

those acting in concert with it (including public relations entities formed in the **[CT14829]** early 1950s to disseminate misleading information on behalf of Philip Morris and others) were the ultimate sources of the misinformation relied on by Mr. Boeken. The fact that Mr. Boeken, after 35 years of addiction and given his present state of health, could not identify specific sources of misinformation is neither unexpected nor fatal to his case. His behavior over the years and present memory are consistent with him having relied on the Philip Morris-sponsored strategy to create false doubt in the minds of people such as Mr. Boeken. The evidence is sufficient to support a finding by the jury that Mr. Boeken's recollections are about what one would expect to hear from a truthful, life-long, addicted smoker who began consuming cigarettes in the 1950s.

There is sufficient evidence on the record to support findings that during the relevant time period Mr. Boeken read or heard actionable misrepresentations made by Philip Morris, and those acting in concert with it, concerning addiction and disease, and that Boeken in fact relied on them to his unwarranted detriment.

B. Concealment.

The record contains substantial evidence that prior to enactment of the FCLAA, Philip Morris possessed research showing that smoking is in fact addicting and cancer-causing, and that Philip Morris actively concealed that information from its customers and the public at large. There is also substantial evidence that Philip Morris actively engaged in premeditated half-truths calculated to convey the misimpression that genuine questions existed, prior to passage of the FCLAA, as to whether cigarettes were in fact addictive or cancer-causing.

Cases cited by Philip Morris do not require the Court to find, as a matter of law, that the health risks of cigarettes had become matters of such common knowledge before passage of the FCLAA that a judgment must

be entered for defendant notwithstanding the verdict. Common **[CT14830]** knowledge is, in this instance, a question of fact — one which cuts both ways for Philip Morris and Mr. Boeken. On the one hand, common knowledge in the form of doubt-producing misinformation, supplied by Philip Morris and those in concert with it, is what Richard Boeken claims he relied on to his detriment. On the other hand, common knowledge in the form of accurate information, primarily supplied by persons and entities other than Philip Morris and those acting in concert with it, is what Philip Morris relies on to exonerate itself from liability to Richard Boeken. The record contains days of testimony and many documents pointing in different directions on this central question, and the jury's assessment prevails because it is supported by substantial evidence whichever way the facts are found.

C. Products Liability.

Philip Morris asserts that "the common knowledge described above also disposes of plaintiff's product liability claims" under "the consumer expectations test." That test focuses on the extent of danger contemplated by the ordinary consumer possessed of "ordinary knowledge common to the community." *Barker v. Lull Eng'g Co.* (1978) 20 Cal.3d 413, 425. The Court is not persuaded that Philip Morris merits a new trial on this issue for the reasons stated in the preceding paragraph.

Philip Morris further asserts that the risk/benefits test of products liability does not apply to cigarettes because that test only applies to cases involving avoidable dangers. *Barker*, 20 Cal.3d at 430. Philip Morris views the risks associated with cigarettes in black and white, all-or-nothing, terms, rather than as a matter of variable risk, as seen by plaintiff. Ultimately, plaintiff's is the legally correct view. It is sufficient for plaintiff to show that the risk of harm could have been reduced by a known design. Restatement of Law Third, Torts: Products Liability § 2. Plaintiff s **[CT14831]** experts testified that there were

reasonable alternative cigarette designs that would have been safer and that would have reduced the risks.

There is sufficient evidence on the record to support the jury's products liability verdict.

D. Statutory Immunity.

Section 1714.45 of the Civil Code, enacted in 1988, immunized manufacturers from liability for inherently unsafe products in certain circumstances where ordinary consumers know the products are unsafe and, nevertheless, choose to consume them. As originally passed, the statute expressly listed tobacco as an immunized product. Ten years later the Legislature changed its mind, amended § 1714.45, and removed statutory immunity for tobacco. Philip Morris, however, contends, among other things, that the statute still immunizes tobacco products from liability for conduct occurring before the January 1, 1998 effective date of the amendment because the amendment is not retroactive. Plaintiff contends, among other things, that the 1998 amendment was intended to have retroactive effect and, in any event, the question of retroactivity does not arise when, as here, a latent disease is first diagnosed after the amendment takes effect.

Philip Morris vigorously and correctly points out that courts do not lightly give retroactive effect to statutes creating civil liability or removing immunities that protect against liability that would otherwise exist. The question is properly within the province of the Legislature, and courts insure that it remains there by requiring a clear indication of retroactive intent before giving a statute retroactive effect. *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207.

The 1998 amendment to Civil Code § 1714.45 does not expressly use the term "retroactive," but that is not the end of the inquiry. This Court must read the amendment, and all its provisions, as a whole, giving effect to all material statutory terms, if possible, and avoiding any construction **[CT14832]** rendering key provisions mean-

ingless. *Skeketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 51-52.

The amendment began as Senate Bill 67 introduced by Senator Quentin Kopp. The legislative facts underlying the Bill were summarized in a Comment to the Senate Judiciary Committee analysis dated April 8, 1997:

> According to the author's office. . . 'Evidence has now become available showing tobacco companies may have deliberately manipulated the level of nicotine, a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers. In addition, evidence shows the tobacco companies have systemically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use.'[7]

These legislative facts prompted the Legislature to eliminate the immunity originally provided tobacco products by Civil Code § 1714.45. A concern arose in the amending process that courts might not apply the legislation retroactively. On April 8, 1997, a Senate Judiciary Committee Comment pointed out:

> Some concern has been expressed that SB 67 would apply only to causes of action arising on or after January 1, 1998, assuming it is enacted this year. In the absence of specific language in the legislation specifying the retroactive application, a **[CT14833]** measure will operate prospectively only upon its enactment.

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[7] Authors' statements evidence Legislative intent. "A legislator's statement is entitled to consideration . . . when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion. *California Teachers Assn. v. San Diego Community College District* (1981) 28 Ca1.3d 692, 700.

One week later, almost certainly in response to these expressed concerns, the Senate added subdivision (d) [now (f)] to "clarify" the Legislature's intent by stating that claims which "were or are brought shall be determined on their merits, without imposition of any claim of statutory bar or categorical defense." This language, coupled with the underlying legislative facts and circumstances prompting it, suggests a legislative determination that tobacco products should never have been immunized in the first instance.

Civil Code § 1714.45(d) expressly provides that the statute, as amended, "shall apply to all product liability actions pending on, or commenced after, January 1, 1998." That means that on the day the amendment became effective, described cases, including Mr. Boeken's, must be decided on their merits without the statutory bar of former § 1714.45 or the categorical defense it had embodied. Sections 1714.45(d) and (f) operate in tandem, and can only achieve their intended purpose in the case of tobacco-related latent injuries by giving them retroactive effect.

The 1998 amendment is replete with past tense language. As an example, the Legislature expressly removed the statutory bar for "California smokers . . . who have suffered or incurred injuries." Civil Code § 1714.45(f). It is difficult to understand how the Legislature could have used the term "have suffered or incurred" to describe only smokers who might in the future suffer injuries from conduct occurring solely after January 1, 1998. If the Legislature had intended for the amendment to reach only people who start smoking after January 1, 1998, it would not have used past tense in describing the timing of the injuries involved. If the legislative facts in view are true (i.e., "the tobacco companies have systemically suppressed and concealed material information and **[CT14834]** waged an aggressive campaign of disinforma-

tion about the health consequences of tobacco use"[8]), then failing to provide retroactivity would have prevented suits by present and past smokers whom the Legislature saw as potential victims of the same conduct that prompted the Legislature to amend Civil Code § 1714.45. Limiting the amendment to prospective application would, in effect, require the Court to conclude the Legislature chose to avoid dealing with the very legislative facts which it plainly had in mind.

Philip Morris contends the Legislature could not retroactively remove § 1714.45's statutory bar and categorical defense, even if it wanted to, because the statute created immutable vested rights. But the immunity codified by Civil Code § 1714.45 is not constitutionally immutable, and can be legislatively abrogated if the state's interests outweigh countervailing public reliance interests. In determining whether a retroactive statute contravenes due process, courts consider the significance of the state interest involved, the importance of retroactive application to effectuation of that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken based on that reliance, and the extent to which retroactive application of the new law would disrupt those actions. *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592.

The state interests supporting the 1998 amendments, protecting past and future California tobacco product consumers, are undeniably compelling. There is: no evidence Philip Morris took any action in reliance on § 1714.45 other than presumably pleading it as a bar to smokers' lawsuits; no evidence that § 1714.45 significantly altered Philip Morris' methods of doing business or caused the company to conduct business differently in California, as contrasted with its business practices **[CT14835]** in other states where it did not have the

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[8] Interestingly, the jury must have found these legislative facts true, making them judicial facts as well.

protection of § 1714.45; and no evidence that retroactive application of the amendment would disrupt any business practices adopted by Philip Morris in reliance on § 1714.45. The Court must conclude, therefore, that retroactive application of the amendment does not offend due process here.

Plaintiff essentially characterizes retroactivity as a red herring because Mr. Boeken was first diagnosed with lung cancer after the 1998 amendment became effective. The California Supreme Court grappled with a similar assertion in *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 534-35 in the context of Proposition 51 and stated that: "[In suits] for personal injuries arising from a latent disease . . . applying the law in effect when plaintiff is first diagnosed with the disease, or when the symptoms of the disease first become manifest, will not work a retroactive application of [a statute]." In a later decision the California Supreme Court added (in a different context): "[T]he critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." *People v. Grant* (1999) 20 Cal.4th 150, 157. While the *Buttram* court carefully limited its decision to address Proposition 51 concerns, its core rationale rested on a compelling need to give full effect to the tort reform measures adopted in Proposition 51 in light of the long-term latency involved with asbestos-related disease. That same policy requirement arises here. It is not necessary, however, to apply *Buttram* in the manner urged by plaintiff, because this Court finds the Legislature intended § 1714.45 to apply retroactively.

E. Punitive Damages.

Philip Morris contends, that even if the evidence supports findings of fraud under a preponderance standard, it does not support such findings under the required clear and convincing **[CT14836]** test. The Court

finds that the evidence in the record, and highlighted in the discussion of defendant's motion for a new trial on the issue of punitive damages, is sufficient to support a punitive damages verdict rendered by clear and convincing evidence.

IV.

ORDERS

Defendant's Motion for a New Trial is denied, with the exception that Philip Morris's Motion for a New Trial is granted on grounds of excessive punitive damages, subject, however, to the condition that the motion is denied if plaintiff consents to a reduction of punitive damages to the sum of $100 million and files a written consent to the reduction by August 24, 2001. If plaintiff does not accept this remission, a new trial is granted solely on the issue of punitive damages.

Defendant's Motion for Judgment Notwithstanding the Verdict is denied in its entirety.

DATED: August 9, 2001

/s/ _____

CHARLES W. McCOY, Jr.
Judge of the Superior Court